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Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

October Term, 1995

MARVIN ZOLT and ZOLT & LOOMIS, P.C.,

Petitioners,

v.

J. REID BINGHAM, as Ancillary Administrator of the ESTATE OF ROBERT NESTA MARLEY, and DAVID J. STEINBERG,

Respondents.

On petition for writ of certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented for Review

1. Should every new item of damages cause a RICO claim to reaccrue?

2. Can a trial judge, who has propounded to the jury a Rule 49(b) General Verdict with Interrogatories, which he misnamed a Rule 49(a) "Special Verdict", refuse counsel's request to ask the jury two questions needed to resolve an inconsistency between a specific finding and the general verdict, and then give judgment on the general verdict, later "harmonizing" the inconsistency by speculating as to what the jurors' answers might have been had the Court permitted the two questions to be asked?

3. Are attorneys fees in a RICO damages action to be summarily awarded by the Court, based on affidavit, or are they 'a legal right and remedy' created by the statute, and therefore triable by jury?

4. Was the fairness of the trial to petitioners irreparably tainted by permitting their testimony to be interrupted by lengthy scripted Fifth Amendment questioning of a co-defendant, and other similar error?

List of Parties

The only parties to this action are listed in the caption. The plaintiff, an ancillary administrator, is the nominee of Mutual Security Merchant Bank and Trust Company, of Jamaica, West Indies which also appears in the action as a third-party defendant. Petitioners have no knowledge of any parents or subsidiaries.

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Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit is reported at 66 F. 3d 553 (App. A). The opinion of the District Court is reported at 823 F. Supp. 1126. (App. B).

Jurisdiction

The Court of Appeals entered judgment on September 28, 1995. (App. C). Rehearing was denied on November 14, 1995. (App. D). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions and Rules Involved

Seventh Amendment

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

18 U.S.C. § 1964(c)

Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

Fed. R. Civ. P. 49(a)

Special Verdicts. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives the right to a trial by jury of the issue so omitted unless before the jury retires the party demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

Fed. R. Civ. P. 49(b)

General Verdict Accompanied by Answer to Interrogatories. The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury

both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered pursuant to Rule 58. When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.

STATEMENT OF THE CASE

(A) The trial

The $6,000,000.00 judgment in this action is based primarily on 18 U.S.C.§ 1964(c). $250,000.00 plus interest was awarded under New York law; the rest is based on RICO.

The gravamen of the complaint is that the defendants helped Rita Marley, the Jamaican decedent's widow, co-administrator, and chief beneficiary, and the mother of four of decedent's beneficiaries, to receive more than her share of the Estate, and to divert royalty income to corporations under her control,[1] which should instead have been sent to the plaintiff, the bank co-administrator of the decedent's estate in Jamaica. ("Mutual Security").

The "fraud" was allegedly accomplished by misleading Mutual Security, the theory being that by defrauding Mutual Security--one of three co-administrators-- defendants defrauded "the Estate."

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[1] The Second Circuit panel, demonstrating its incomplete grasp of the record, incorrectly stated in its opinion that petitioners were found to have "diverted foreign music assets and royalty income from Marley's estate *to themselves*".(emphasis supplied). This was not found to have occurred, and there would have been no basis in the record for such a finding to have been made. Although allegations of that nature were made by plaintiff's counsel both prior to trial and during plaintiff's counsel's opening statement, plaintiff's counsel thereafter commendably abandoned such claims when plaintiff's own expert witness -- an accountant from a large accounting firm -- testified that the moneys received by petitioners, over a period of six years in which they rendered extensive accounting services to the Estate, were *not* excessive. See 810 F. Supp. at 102.

Decedent died on May 11, 1981.

Mutual Security was approached by the decedent's Jamaican lawyer to become co-administrator. On June 3, 1981, months prior to its appointment as a co-administrator, Mutual Security made its first inquiries about the decedent's assets.

In December, 1986, alleging RICO and other violations, Mutual Security brought suit, in the United States District Court for the Southern District of New York, against the decedent's American lawyers and accountants, located in Philadelphia and New York.

The widow, although the alleged recipient of the moneys allegedly "diverted" by the "schemes", was not named as a defendant.

At trial the first witness plaintiff called was the defendant Marvin Zolt. Judge Conboy permitted several weeks of examination of Mr. Zolt by plaintiff's counsel, consisting almost exclusively of lengthy leading questions, to which Judge Conboy ordered Mr. Zolt, on pain of imprisonment, to answer each question "yes" or "no", and forbade him from explaining why any of these lengthy leading questions could not be properly answered by a "yes" or "no".

During the remainder of the trial, Judge Conboy instructed other witnesses that they did not have to respond "yes" or "no" if the question did not lend itself to such an answer--the exact opposite of the instructions he had given Mr. Zolt.

The examination of Mr. Zolt by plaintiff's counsel was continuous, except for interruption by two days of "testimony" of defendant David Steinberg, in which Mr. Steinberg was asked hundreds of questions, many of them referring to Mr. Zolt, to which Mr. Steinberg's response was the invocation of the Fifth Amendment.

(B) The RICO limitations issue.

After three (3) months of trial, after being presented with proposed Special Verdict Sheets, the trial judge presented the jury with a 72-question document which he denominated a "Special Verdict Sheet", although it fit the description not of a "Special Verdict" under Fed. R. Civ. P. 49(a), but of a General Verdict under Fed. R. Civ. P. 49 (b).

Under the section entitled "The Statutes of Limitations", the jurors were asked the following question:

> 52. Place a check mark next to the earliest date as to which the Estate had actual knowledge of the defendants' wrongful acts:
>
> June 1986_____
> March 30, 1984 ____
> December 10, 1983 ____
> March 30, 1983 ____
> December 10, 1982 ____

Since December 10, 1982, was more than four (4) years prior to commencement of this action, it was agreed by the judge, the plaintiff, and the defendants, that the RICO claim would be time barred if discovered on or before that date.

The case was tried on that theory, and abundant evidence educed--especially during the cross-examination of Mutual Security's Louis Byles--that the plaintiff had indeed discovered the allegedly wrongful acts long prior to that date, even prior to its appointment as a co-administrator, and indeed had been aware of the decedent's estate's assets in the United States on June 3, 1981, the first day it asked questions.

After two (2) weeks of deliberation, the jury checked off December 10, 1982, the earliest date on the sheet.

Inexplicably, the trial court nevertheless awarded

judgment to plaintiff on the RICO claim.

(C) The inconsistency.

In addition to supposedly settling the RICO limitations question, the jury's answer to question 52 raised an inconsistency going to the merits of both the RICO and state law fraud claims.

While the jurors were still impanelled, and in their seats, the attorney for the petitioner, at sidebar, pointed out to the trial court the logical inconsistency between the jurors' general verdict that plaintiff had been defrauded and their specific finding, in response to interrogatories, that the plaintiff had "actual knowledge of the defendants' wrongful acts" as of the earliest date presented to them. Counsel requested that the jurors be asked the following two questions, the answers to which would either (a) remove the inconsistency, or (b) make it clear that the jury had not understood the definition of fraud:

> State whether the estate had actual knowledge of the wrongful acts of defendant Marvin Zolt prior to December 10, 1982?
>
> If the answer to the foregoing is "yes", state when the estate acquired actual knowledge of the wrongful acts of Marvin Zolt.

The judge refused. And when counsel asked "may I be heard on that?", the judge responded: "No".

The judge thereafter dismissed the jurors.

(D) The RICO attorneys fee award.

Throughout the litigation, and during the trial as well, the district judge completely foreclosed inquiry into the issue of RICO attorneys fees, implying that this would be permitted after a finding of liability. Subsequent to the judgment, over petitioners' objections that they were entitled to discovery, trial, and jury trial on the issue, the court awarded plaintiff $3,000,000.00 in RICO attorneys fees on the basis of an affidavit of plaintiff's counsel.

(E) Post-trial proceedings.

Post-verdict and post-judgment motions were made; the district court adhered to its positions.

(F) The appeal in the Second Circuit.

The Second Circuit affirmed the district court in each and every respect.

REASONS FOR GRANTING THE WRIT

1. The RICO claim was time barred.

The RICO statute is silent as to its limitations period. In *Agency Holding Corp. v. Malley-Duff & Associates,* 483 U.S. 143 (1987), this Court prescribed a four-year limitations period, but left open the question of accrual.

The Second Circuit's opinion practically pleads with this Court to offer guidance on the accrual issue: "The result has been a split among the circuits generating as many as half a

dozen conflicting accrual rules." 66 F.3d at 558.

The hopeless confusion of the Second Circuit is exemplified by the irrational decision it reached in the instant case.

Although the jurors expressly found as a fact that the plaintiff had acquired actual knowledge of all of the defendants' wrongful acts more than four (4) years prior to commencement of the action, the trial judge nevertheless awarded judgment to the plaintiff under RICO, on the ground that each occurrence of *damages* was a "new and independent injury" within the meaning of the Second Circuit's decision in *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096 (2d Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989).

Such an expansive reading of *Bankers Trust*--which would in essence result in no RICO claim ever being time barred so long as damages continue to accrue--was subsequently rejected by a panel of the Second Circuit in *Long Island Lighting Co. v. IMO Industries Inc.*, 6 F. 3d 876 (2d Cir. 1993), as it had previously been rejected by the Third Circuit in *Glessner v. Kenny*, 952 F. 2d 702 (3d Cir. 1991), and by the well-reasoned decision of Judge Freeh in *Ackerman v. National Property Analysts, Inc.* 887 F. Supp. 494 (S.D.N.Y. 1992).[2]

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[2] Judge Conboy, in his June 16, 1993, post-judgment decision, purported to rationalize the result by saying that the jury expressly found that all the RICO damages occurred subsequent to December 31, 1982. However, an examination of the verdict sheet shows that that was the *only* time period Judge Conboy *inquired into* on the subject of damages. The pertinent damages questions were posed as

[Footnote continued on next page]

The Second Circuit panel, apparently recognizing the illogic in Judge Conboy's reasoning--but nevertheless reaching out to find grounds for affirmance against the confusing matrix of its own decisions--developed an entirely different explanation for the result, one which was also fatally irrational, because it contradicted the jury's express findings:

> We think the instant case is closer factually to *Bankers Trust* than to either *LILCO* or *Cruden*, as it involves a continuing series of *fraudulent actions* undertaken to divert and conceal assets and income... As a consequence, *with each*

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follows:

> 57. ...[W]hat is the dollar amount of damages that will compensate the Estate for its RICO injury?
>
> 59. [W]hat is the dollar amount of damages that will compensate the Estate for its common law injuries?
>
> 60. What amount in dollars, of the damages you found in questions fifty seven and fifty-nine, do you find the Estate of Robert Nesta Marley suffered after each of the following dates?
>
> Subsequent to March 31, 1984 $_____
> Subsequent to December 31, 1983 $_____
> Subsequent to March 31, 1983 $_____
> Subsequent to December 31, 1982 $_____

Thus the trial court erroneously equated each new item of *damages* with a "new and independent injury" and, in an astonishing example of circular reasoning, *assumed* that no damages occurred before December 31, 1982, when it had only asked the jury what damages occurred *after* December 31, 1982. (Indeed, the largest single item of alleged "damages" was a $1,000,000.00 royalty check from Almo Records, which had been deposited in late June, 1981.).

diversion a new civil RICO cause of action accrued, with a corresponding four-year limitations period...

66 F.3d at 561. (emphasis supplied).

There are only two ways to read this confusing passage. Either the Second Circuit is saying that new wrongful acts occurred during the four-year period prior to commencement of suit, thereby *impermissibly violating the petitioners' Seventh Amendment rights by overruling the jury's express finding that all of the wrongful acts had occurred prior to that period,* or it is saying that the new acts were not wrongful, in which it is *sub silentio* agreeing with the trial judge's outlandish holding that the mere accrual of new damages causes the RICO claim to reaccrue as well.

The Second Circuit cannot fairly, rationally, and predictably apply the "rule" which it has itself sought to create: the "separate accrual" rule which provides that the RICO claim reaccrues upon "independent injury".

It is respectfully submitted that the reason the Circuit cannot apply the "rule" is that the rule is by its very nature a quagmire, and an invitation to disaster. The separate accrual rule not only invites, but mandates, highly philosophical and subjective debate as to the distinction between "damages" and "injuries", and contradicts the fundamental concept of any RICO claim, since a RICO claim does not come into being as the result of any number of "independent" injuries, but as the result of a "pattern". *Agency Holding Corp. v. Malley-Duff & Associates,* 483 U.S. at 154.

This Court should, it is respectfully submitted, end the wild discord among the Circuits, and adopt the most rational of the RICO accrual principles--the "discovery rule". *See, e.g., Bivens Gardens Office Building, Inc. v. Barnett Bank of Florida, Inc.* 906 F.2d 1546 (11th Cir. 1990).

But whichever rule this Court adopts, reversal should be the result here. Under either the "discovery" or the "separate accrual" rule, the judgment in the instant case logically must be reversed, because all of the elements of the RICO claim--if they were present at all--were clearly present and known to plaintiff prior to December 10, 1982, and nothing occurred subsequent to that date, according to the jury, other than the occurrence of new "damages".

Even were this Court to adopt the separate accrual rule enunciated by the Second Circuit in its previous decisions, reasoned application of that rule to the jury's findings mandates dismissal.

The RICO claim in this case was time barred and should be dismissed.

The irrationality of the District Court in concluding that the occurrence of new damages caused the claim to re-accrue, and the irrationality of the Circuit Court in concluding that new wrongful acts had occurred although the jury had found otherwise, demonstrate the state of confusion in which these Courts find themselves, and exemplify the need for the Supreme Court to step in and establish a just, workable, and uniform rule governing RICO accrual.

2. The trial court erred in refusing to ask two questions needed to resolve an inconsistency, and then reconciling the inconsistency by speculating as to what the jurors might have responded had they been asked.

The jury held, in the generalized section of the "special verdict" form, which was in reality the "general verdict" section of a Rule 49(b) General Verdict With Interrogatories, that petitioners were guilty of fraud, both under RICO and under

New York law. (The Court had declined defendants' request for a genuine Special Verdict form.).

However, as noted earlier, when asked a very specific question as to when plaintiff acquired "actual knowledge of the defendants' wrongful acts", the jurors picked the earliest date offered to them. (This happened to be December 10, 1982, a date selected because it was, or at least was supposed to be, the RICO cutoff date : i.e., a date selected arbitrarily because it was a date which all parties agreed was more than four years prior to commencement of the action.).

Since plaintiff's actual knowledge of the allegedly wrongful acts was diametrically inconsistent with the essential elements of deception and reliance required for a finding of fraud, petitioners' counsel pointed out the possible inconsistency to the trial judge, and requested that the Court ask the jurors two additional questions:

> State whether the estate had actual knowledge of the wrongful acts of defendant Marvin Zolt prior to December 10, 1982?
>
> If the answer to the foregoing is "yes", state when the estate acquired actual knowledge of the wrongful acts of Marvin Zolt.

There had been substantial evidence at the trial, especially during the cross-examination of Mutual Security's Louis Byles, to the effect that Mutual Security was aware of the allegedly "wrongful" way in which Bob Marley, and after his death Rita Marley, handled the Bob Marley offshore royalty income, from the very first day Mutual Security got involved with the Marleys, which was June 3, 1981.

If the plaintiff at all pertinent times had knowledge of defendant's "wrongful acts", the possibility of "fraud" against the plaintiff would be negated.

If, on the other hand, plaintiff acquired its "actual

knowledge" some time between June 3, 1981, and December 10, 1982, then the jury finding of fraud would have been "harmonized".

The judge refused to find out; he refused to ask the questions; he even refused to hear counsel out on his reasons for proffering the questions while the jury was still present.

He chose instead to dismiss the jury and leave the verdict under a perpetual, and unnecessary, cloud.

With eight months to think about his mistake, the only way the trial judge was able to "harmonize" the inconsistency was to speculate on what the jurors *might* have responded were they asked the very same questions he had *refused* to ask them: he guessed that the jurors might have concluded that plaintiff relied on defendants' alleged misrepresentations "through 1981 and up to December 10, 1982". 823 F. Supp. at 1131.

His decision made no reference at all to the fact that he had been explicitly requested by counsel to ask the jury about that time period, and had refused to do so, although reminded of this fact by petitioners' motion papers.

The Second Circuit joined the trial judge in making the same guess, ignoring the fact that it was petitioners' right to have that ambiguity resolved by the jury, not by judges, and avoided the issue which the trial judge himself had avoided: whether it was an impropriety on his part to refuse to ask the questions.

The Second Circuit held only that "the district court's reconciliation was a fair explanation that eliminated the alleged inconsistency", a conclusion with which we would not take issue *had the ambiguity first been raised by petitioners eight months after the verdict, rather than when it was raised, with the jury still in the jury box.*

Both the trial judge and the Second Circuit have declined to address the real issue, which is the impropriety of

the district court (a) mixing up Fed. R. Civ. P. 49(a) with Rule 49(b); (b) creating a "special verdict" form that was really a Rule 49(b) general verdict accompanied by interrogatories; (c) ignoring the mandate of Rule 49 (b) that specific findings of fact cannot be overruled by inconsistent general verdicts; (d) rudely ignoring the advice of counsel--while the jury was still impanelled--of a major inconsistency between a specific finding and the general verdict; and (e) choosing to make its own guess as to what the jurors might have been thinking, instead of just asking them.

This conduct deprived petitioners of their right to trial by jury of a major issue in the case, and warrants reversal of the judgment below.

3. The RICO attorneys fee award was improperly awarded in summary fashion.

Throughout the litigation, the Court consistently foreclosed petitioners from inquiring into the RICO attorneys fees issue, always stating that the issue was being raised prematurely, and implying that it would be dealt with later in plenary fashion, if and when a finding of RICO liability was made.

Subsequent to the trial, the Court held plaintiff to be entitled to a RICO attorneys fee award, and directed plaintiff's counsel to submit an "accounting".

The "accounting" plaintiff submitted was an affidavit.

Petitioners, declining to be drawn into a war of affidavits and thus risk possible waiver of their right to fully litigate the attorneys fee issue, reminded the district court that, under applicable principles of law, 18 U.S.C. §1964(c)--by creating a right to sue for attorneys fees under RICO-- "creates legal

rights and remedies, enforceable in an action for damages in the ordinary courts of law" within the meaning of *Curtis v. Loether*, 415 U.S. 189 (1974), and that the attorneys fees are therefore subject to the parties' rights to discovery, trial, and jury trial, and reserved their rights to those procedural safeguards.

The Court nevertheless proceeded to award plaintiff more than $3,000,000.00 in attorneys fees, based solely on plaintiff's counsel's affidavit.

This, too, was error.

As this Court held in *Curtis v. Loether*, 415 U.S. 189 (1974), the Seventh Amendment right to a jury trial for actions at common law applies to "actions enforcing statutory rights, and requires a jury trial on demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law."

Attorneys fees--in this case $3,000,000.00 in attorneys fees--are certainly a "legal right[...] and remed[y]".

Both the trial judge and the Second Circuit chose to *completely ignore* the decision of this Court in *Curtis v. Loether, supra*, although petitioners cited the case to both courts.

This, too, was reversible error, although one which, concededly, need not be reached if this Court reverses on the ground that the RICO claim was time barred.

4. Petitioners were deprived of a fair trial.

The first witness plaintiff called was the defendant Marvin Zolt. Judge Conboy permitted several weeks of

examination of Mr. Zolt by plaintiff's counsel,[3] consisting almost exclusively of lengthy, stylized, and theatrical leading questions, of the "when did you start beating your wife" school of trial advocacy.

Judge Conboy ordered Mr. Zolt, *on pain of imprisonment,* to answer each question "yes" or "no" and forbade him from explaining why any of these lengthy leading questions could not be properly answered by a "yes" or "no". (During the remainder of the trial, Judge Conboy regularly instructed all other witnesses that they did not have to respond "yes" or "no" if the question did not lend itself to such an answer -- the exact opposite of the instructions the Court had given Mr. Zolt).

The defendant Mr. Zolt is an accountant. He was 72 years old at the time of trial. His sole involvement with the Marleys was as one of their accountants. Yet for a period of two (2) weeks, he was examined almost exclusively on legal matters, rather than accounting matters, all of which had occurred from ten (10) to sixteen (16) years prior to the trial.

Plaintiff's counsel saw fit to commence the trial with three weeks of such "testimony" by Mr. Zolt, almost all of which was taken in a "cheap shot" manner.

In almost every instance Mr. Zolt was asked a leading question. Plaintiff's counsel purposefully confined himself mostly to questions which -- based on (a) Mr. Zolt's 16 deposition transcripts and (b) the laws of nature as to what a 72

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[3] This singularly uninformative and prejudicial examination was interrupted by two equally prejudicial and uninformative days of co-defendant David Steinberg taking the Fifth Amendment in response to similar, scripted questions to which plaintiff's counsel knew the answer would be Mr. Steinberg's invocation of the Fifth Amendment

years old man can remember -- would have to be, in words or in substance, "I don't know" or "I don't remember". Then, as if to impeach Mr. Zolt's credibility, counsel would produce a document -- inevitably a completely innocuous, undisputed, and unexceptionable document--and in imperious and theatrical language, elicit, one-by-one, the witness's recitation of the contents of each paragraph or sentence therein contained.

Often the witness could not authenticate or recognize the document at all, but was nevertheless forced to recite its contents to the jury, anyway.

Instead of discouraging this overly time-consuming, intellectually dishonest, charade, the trial judge reveled in it, compounding the prejudicial nature of this empty exercise by repeatedly (a) intervening in the questioning in a prosecutorial mode, (b) himself asking unfair and misleading questions of the witness in a disbelieving and disrespectful manner, (c) asking leading questions which contained inappropriate suggestions of unproved and unprovable "facts", (d) acting as if he had superior knowledge of the facts than the witness, almost as if he had personally been present at the time of the events in question, (e) consistently overruling the well-taken objections of defendants' counsel, (f) threatening defendants' counsel not to make objections in accordance with the rules of evidence, (g) threatening Mr. Zolt with *imprisonment* unless he answered "yes" or "no" to these entirely improper questions, (h) repeatedly volunteering uncalled for, disparaging remarks about Mr. Zolt at sidebar, and seeking to discourage co-defendants' counsel from objecting to questions directed to Mr. Zolt, (i) ruling that Mr. Brundige's repeated questioning of Mr. Zolt on matters as to which he had no recollection did somehow constitute evidence in chief of the "facts" suggested by the leading questions, (j) ruling that Mr. Zolt's lack of knowledge or recollection of these matters constituted affirmative evidence

that he was "lying", and (k) showing undue deference to plaintiff's counsel, frequently asking him -- in the presence of the jury -- if he "objected" to a proper objection raised by defendants' counsel, as if it were plaintiff's counsel -- rather than the trial judge -- who was presiding.

Although it is fundamental that a party may not prove an issue on which he has the burden of proof by simply calling the opposing party to the stand, posing questions to him, and urging the jury to disbelieve the witness's answers *[see, e.g., Bose Corp. V. Consumers Unions, 466 U.S. 485, 512 (1984)]*, the trial judge repeatedly overruled objections made by defendants' counsel in this regard. The following exchange is illustrative:

> [sidebar]
>
> MR. FINK: Your Honor, again, and I apologize for perhaps being repetitious, but this entire morning has been leading questions which are improper, but a lot of facts that appear now to be established where almost the entire story of asking questions and then responses of I don't recall, and I'm very concerned that the jury now has a complete picture, but there is really very little in the evidence.
>
> THE COURT: They can draw the inference that he is lying.
>
> MR. FINK: They can
>
> THE COURT: Yes.

Plaintiff's counsel was permitted by the judge to repeatedly browbeat Mr. Zolt and even to ask him series of questions -- in a pompous and incriminating manner -- as to what Mr. Zolt *did not recall*, as if Mr. Zolt's failure to remember what had occurred at a meeting eleven (11) years earlier was evidence of something:

Q. *Isn't it a fact, Mr. Zolt, that you don't recall* whether or not there were any discussions at the Coudert meeting on June 26, 1981 as to who would be the ultimate beneficiary of the Netherlands Antilles company?

A. Yes.

Q. *Isn't it also a fact, sir, that you don't recall* whether there were any discussions as part of that presentation by Coudert Brothers that the BVI companies would be liquidated?

A. Yes.

Q. *And isn't it also a fact, sir, that you don't recall* whether there were discussions at a Coudert Brothers' meeting with respect to whether arrangements would be made for the transfer of Bob Marley's stock in his BVI companies to Rita Marley?

A. Is it a fact that I don't recall?

Q. Right.

A. Yes.

Q. *And isn't it also a fact that you don't recall* whether or not there was discussed any thing there at that meeting regarding the three BVI companies?

A. Yes.

Additionally, although the Court and plaintiff's counsel advised defendants there would be 20 to 30 minutes of 'scripted' Fifth Amendment questioning of defendant Steinberg, the Court permitted the plaintiff's highly prejudicial and unnecessary exercise to go on over a period of almost two days, in the middle of Mr. Zolt's examination, thus casting a dark shadow over the entire proceedings. The Fifth Amendment exercise was not even remotely calculated to advance the fact-finding process; its sole purpose was to taint the proceedings.

As a result of this bizarre inquisition, sanctioned, dominated, and even at times conducted, by the trial judge information which could have been presented in 2 days took 3 weeks, and was presented in a deceptive manner.

The first three weeks of the trial consisted of no more and no less than the systematic humiliation of a defendant, in order to create an atmosphere -- with "smoke" rather than evidence -- of guilt.

Such Star Chamber tactics have no place in a federal court.

CONCLUSION

The RICO claim was time barred, and must be dismissed, along with the accompanying attorneys fee award.

In view of the trial court's deliberate refusal to resolve the inconsistencies in the jury's verdict as to the state law fraud claim, despite counsel's explicit request that it do so while the jurors were still impanelled, and in view of the Court's otherwise unfair and prejudicial conduct of the proceedings, the state law fraud claim should be retried.

Respectfully submitted,

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Supreme Court, U.S.
FILED

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No. _____

IN THE

Supreme Court of the United States

October Term, 1995

MARVIN ZOLT and ZOLT & LOOMIS, P.C.,

Petitioners,

v.

J. REID BINGHAM, as Ancillary Administrator of the ESTATE OF ROBERT NESTA MARLEY, and DAVID J. STEINBERG,

Respondents.

On petition for writ of certiorari to the United States Court of Appeals for the Second Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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APPENDIX A

(Opinion of United States Court of Appeals)

Citation	Rank (R)	Database	Mode
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RICO Bus. Disp. Guide 8900

(Cite as: 66 F. 3d 553)

J. Reid BINGHAM, as Ancillary Administrator of the Estate of Robert Nesta Marley,

Plaintiff-Appellee,

v.

Marvin Zolt; ZOLT & Loomis, P.C., and David J. Steinberg,

Defendants-Appellants,

Greenstein, Gorelick, Price, Silberman & Lavson,

Defendant,

Bluestein, Rutstein & Mirarchi, P.C.; Martin Oliner; Martin Oliner, P.C. and Coudert Brothers,

Defendants-Third-Party-Plaintiffs,

Rita Marley and Mutual Security Merchant Bank and Trust Company

Third-Party-Defendants.

Nos. 621, 622, Docket 93-7695, 93-7709.

United States Court of Appeals, Second Circuit,

Argued December 12, 1994, Decided September 28, 1995.

Administrator of estate for singer brought action alleging fraud, breach of fiduciary duty and Racketeer Influenced and Corrupt Organizations Act (RICO) violations against singer's former legal and financial advisors. The United States District Court for the Southern District of New York, Kenneth Conboy, J., 823 F. Supp. 1126, entered judgment upon jury verdict for estate, and advisors appealed. The Court of Appeals, Cardamone, Circuit Judge, held that : (1) RICO claims

were not time barred under applicable "separate accrual" rule; (2) estate had standing to bring instant claims; (3) jury verdict was not inconsistent; (4) compensatory damages award based on entire amount of funds diverted was proper even if some diverted funds were paid to estate beneficiaries and used to pay estate obligations; (5) common-law damages award was proper despite dismissal of some common-law claims; (6) attorney's fees award was proper; and (7) trial was not conducted unfairly to one defendant.
Affirmed.

1. Limitation of Actions k95 (3)
241k95 (3)
Under "Separate accrual" rule for determining when civil claim accrues under Racketeer Influenced and Corrupt Organizations Act (RICO), new claim accrues, triggering new four year limitations period, each time plaintiff discovers, or should have discovered, new injury caused by predicate RICO violations. 18 U.S.C.A. s 1961 et seq.
See publicatio.. Words and Phrases for other judicial constructions and definitions.

2. Limitation of Actions k95 (3)
241k95 (3)
Under "separate accrual" rule for determining when civil claim accrues under Racketeer Influenced and Corrupt Organizations Act (RICO), plaintiff may only recover for injuries discovered or discoverable within four years of time suit was brought; as long as separate and independent injuries continue to flow from underlying RICO violations, regardless of when they occurred, plaintiff Corp. (C) West 1996 No claim to orig, U.S. govt. works may wait indefinitely to sue, but may then win compensation only for injuries discovered or discoverable within

four-year "window" before suit was filed, together with any provable future damages. 18 U.S.C.A. s 1961 et seq.

(3) Limitation of Actions k55 (6)
241k55 (6)
Claims of singer's estate against singer's former legal and financial advisors, under Racketeer Influenced and Corrupt Organizations Act (RICO), were not time barred though estate had actual knowledge of defendants' wrongful acts more than four years prior to suit, as defendants' conduct involved continuing series of fraudulent actions undertaken to divert and conceal assets and income and, under "separate accrual" rule, estate could recover damages for acts that took place within four years prior to suit. 18 U.S.C.A. s 1961 et. seq.

(3) Limitation of Actions k100 (7)
241k100 (7)
Claims of singer's estate against singer's former legal and financial advisors, under Racketeer Influenced and Corrupt Organizations Act (RICO), were not time barred though estate had actual knowledge of defendants' wrongful acts more than four years prior to suit, as defendants' conduct involved continuing series of fraudulent actions undertaken to divert and conceal assets and income and, under "separate accrual" rule, estate could recover damages for acts that took place within four years prior to suit. 18 U.S.C.A. s 1961 et. seq.

(4) Corporations k202
101k202
Estate of singer had standing to assert causes of action including fraud, breach of fiduciary duty and Racketeer Influenced and Corrupt Organizations Act (RICO) violations against singer's

former legal and financial advisers, despite claim that causes of action belonged to corporations which were wrongfully diverted from estate and not estate, which was merely shareholder; diversion of contract rights and royalties to diverted corporations directly misappropriated funds that would have gone to estate, diversion of corporations caused injury to estate, not corporations themselves, and equitable exception allowed estate to bring action based on scheme in which estate was injured as shareholder only, since defendants owed fiduciary duties directly to singer and his estate. 18 U.S.C.A. s 1961 et seq.

[5] Corporations k202
101k202
When claim is that corporate property has been removed from corporation, it is corporation, which has independent legal identity, that must seek, on its own or derivatively, to redress its injury; shareholder in such case is injured only as result of injury to another, namely, the corporation, and therefore generally lacks standing.

[6] Action k13
13k13
Where individual owns property, including cash, real estate, or shares of stock, and that property is stolen, individual suffers injury personal to him and no other; it is only individual that may properly seek to redress his injury and no other; it is only individual that may properly seek to redress his injury.

[7] Federal Civil Procedure k2242
170Ak2242
Where there is alleged inconsistency in jury's verdict, trial court is obliged to harmonize dissonance, if such is fairly possible.

[8] Fraud k66
184k66
Jury's verdict finding fraud, which required that plaintiff justifiably relied on false representations of defendants, and finding that plaintiff had actual knowledge of defendants' wrongful acts was not inconsistent, as jury indicated that plaintiff had such knowledge as of particular DATE and fraud could have occurred before that DATE.

[9] Federal Courts k799
170Bk799
There is strong presumption that jury in reaching its verdict complied with instructions given by district court; jury's verdict reached after proper instructions must be upheld where there is reasonable explanation for jury seemingly inconsistent answers.

[10] Fraud k62
184k62
Singer's estate could recover compensatory damages for fraud, breach of fiduciary duty, and Racketeer Influenced and Corrupt Organizations Act (RICO) violations, based on diversion of assets from estate by singer's former legal and financial advisors, in amount wrongfully transferred, even if some of funds were distributed to estate beneficiaries or used to pay for estate's legitimate expenses; estate was separate from its beneficiaries, potential for double recovery could be addressed in probate proceedings, and jury was properly instructed to reduce damages by amounts used to pay estate obligations which estate would have authorized. 18 U.S.C.A. s 1961 et seq.

[10] Racketeer Influenced and Corrupt Organizations k85
319Hk85

Singer's estate could recover compensatory damages for fraud, breach of fiduciary duty, and Racketeer Influenced and Corrupt Organizations Act (RICO) violations, based on diversion of assets from estate by singer's former legal and financial advisors, in amount wrongfully transferred, even if some of funds were distributed to estate beneficiaries or used to pay for estate's legitimate expenses; estate was separate from its beneficiaries, potential for double recovery could be addressed in probate proceedings, and jury was properly instructed to reduce damages by amounts used to pay estate obligations which estate would have authorized. 18 U.S.C.A. s 1961 et seq.

[11] Federal Courts k776
170Bk776
Measure of damages upon which factual computation is based is question of law and thus is subject to de novo review.

[12] Executors and Administrators k1
162k1
Estate is entity separate and distinct from its beneficiaries.

[13] Damages k15
115k15
Common law damages award in action by singer's estate against singer's former legal and financial advisors, which alleged fraud, breach of fiduciary duty, conversion, negligence, and gross negligence, was not improper, though latter three claims were dismissed as time-barred, as jury's special verdict found defendants liable on each common law claim, and each claim presented acts, and same injuries caused by same actors.

[14] Damages k15
115k94
Whether defendant is liable to plaintiff under one or many theories of liability does not affect damages award because amount of compensatory damages awarded is not dependent on number of theories that plaintiff alleges and under which it may recover; rather, amount of damages depends on extent of injury suffered.

[15] Damages k94
District court could reduce from $1 million to $250,000 punitive damages awarded to singer's estate in action alleging fraud, breach of fiduciary duty, and Racketeer Influenced and Corrupt Organizations Act (RICO) violations against singer's former legal and financial advisors and was not required to vacate entire award, based on post judgement finding that RICO cause of action could not support punitive damages, as aggregate punitive damages award was preferred, due to risk that separate awards would result in higher total, and award was not high as to shock judicial conscience and constitute denial of justice. 18 U.S.C.A. s 1961 et seq.

[16] Racketeer Influenced and Corrupt Organizations k82
319Hk82
Trial court, not jury, has responsibility of determining attorney's fees awards pursuant to Racketeer Influenced and Corrupt Organization Act (RICO). 18. U.S.C.A. s1964 (c)

[17] Federal Civil Procedure k2737.5
Award of attorney's fees in action by singer's estate alleging fraud, breach of fiduciary duty, Racketeer Influenced and Corrupt Organizations Act (RICO) violations, and other claims against singer's former legal and financial advisors was not

excessive on grounds that certain expenses were unreasonable or that three of six charges were dismissed as time-barred, as estate detailed accounting of claimed attorney's fees and, despite dismissal, estate obtained jury verdict and judgement against defendants. 18 U.S.C.A. S 1964(c)

[17] Racketeer Influenced and Corrupt Organizations k82
319hk82
Award of attorney's fees in action by singer's estate alleging fraud, breach of fiduciary duty, Racketeer Influenced and Corrupt Organizations Act (RICO) violations, and other claims against singer's former legal and financial advisors was not excessive on grounds that certain expenses were unreasonable or that three of six charges were dismissed as time-barred, as estate submitted detailed accounting of claimed attorney's fees and, despite dismissal, estate obtained jury verdict and judgment against defendants. 18 U.S.C.A. s 1964 (c)

[18] Federal Civil Procedure k1969
170Ak244
Trial on claims of fraud, breach of fiduciary duty and Racketeer Influenced and Corrupt Organizations Act (RICO) violations was not conducted in improper and prejudicial manner as to defendant, where plaintiff's counsel's leading questions were justified by defendant's status as hostile witness, threat of contempt was justified by defendant's responses which went beyond questions asked, judge's statement, in sidebar, that jury could infer defendant was lying meant only that could credit documentary evidence where defendant claimed not to remember, and judge did not instruct jury that witness's inability to recall constituted evidence of facts asserted in attorney's question. 18 U.S.C.A. s 1961 et sel.; Fed.Rules Evid.Rule (c), 28 U.S.C.A.

[18] Witnesses k244
410L244
Trial on claims of fraud, breach of fiduciary duty and Racketeer Influenced and Corrupt Organizations Act (RICO) violations was not conducted in improper and prejudicial manner as to defendant, where plaintiff's counsel's leading questions were justified by defendant's status as hostile witness, threat of contempt was justified by defendant's responses which went beyond questions asked, judge's statement, in sidebar, that jury could infer defendant was lying meant only that could credit documentary evidence where defendant claimed not to remember, and judge did not instruct jury that witness's inability to recall constituted evidence of facts asserted in attorney's question. 18 U.S.C.A. S 1961 et se1.; Fed.Rules Evid.Rule (c), 28 U.S.C.A.

[19] Racketeer Influenced and Corrupt Organizations k2
319Hk2
Pattern and enterprise requirements under Racketeer Influenced and Corrupt Organizations Act (RICO) are not unconstitutionally vague. 18 U.S.C.A. s 1961 et seq.
*556 Ray Beckerman, New York City (Gallet Dreyer & Berkey, New York City, of counsel), for appellants Marvin Zolt and Zolt & Loomis, P.C. Jeremy D. Mishkin, Philadelphia, PA (Howard J. Bashman, Motgomery, McCracken, Walker & Rhoads, Philadelphia, PA, of Counsel) , for appellant David J. Steinberg. Robert W. Brundige, Jr., New York City (Jeffrey R. Coleman, Cheryl B. Schreiber, Seth D. Rothman, Hughes Hubbard & Reed, New York City of Counsel), for appellee

Before: NEWMAN, Chief Judge, OAKS and CARDAMONE, Circuit Judges.

CARDAMONE, Circuit Judge:
Defendants Marvin Zolt, Zolt and Loomis, P.C. (collectively Zolt), and David Steinberg appeal from an amended judgment entered July 21, 1993 in the United States District Court for the Southern District of New York (Conboy, J.) That, after a jury trial, found defendants liable in damages to the estate of Robert Nesta (Bob) Marley for fraud, breach of Fiduciary Duty, and violations of civil RICO under 18 U.S.C. s 1962 (b), (c), and (d) (1988). Bob Marley was the Jamaican singer-songwriter responsible for bringing the reggae sound to the world and, to his fans, still is reggae music. Even today, 15 years after his death from brain cancer, he continues to be the world's best-selling reggae artist. He used his music as a vehicle to spread global messages of peace, brotherhood, African unity, and international morality. For his contributions to ending political violence in Jamaica, he was awarded in 1978 the United Nations Medal of Peace. It is particularly revealing of the perversity of human nature that such a person's estate be plundered by the perfidy of his closest advisors. It is that duplicity that gave rise to the litigation before us on this appeal

FACTS
A. BACKGROUND

Robert Nesta (Bob) Marley died intestate on March 11, 1981 survived by his Rita and 11 children. Under Jamaican intestacy law his wife was entitled to 10 percent of his estate outright and held a life interest in another 45 percent of it. Marley's 11 children were entitled to equal shares of the remaining 45 percent outright, plus a remainder interest in Rita's 45 percent life estate.

For five years from the time of Marley's death in 1981 until 1986, defendants David Steinberg, Marley's attorney, and

Marvin Zolt, Marley's accountant, with the aid of his wife, Rita Marley, developed and implemented numerous schemes that allegedly diverted *557 foreign music assets and royalty income from Marley's estate to themselves. Defendants argued that their activities in creating new corporations and transferring funds from the estate to a chain of international companies were aimed at minimizing the estate's tax liabilities, leaving more to be distributed to Marley's beneficiaries.

B. THE PRINCIPAL SCHEMES

Of the numerous schemes by which defendants diverted estate assets and income, only the four principal ones will be outlined.

1. Share Transfer Scheme. Before Bob Marley died he, individually, and his three wholly-owned British Virgin Islands companies (BVI Companies), received royalty payments and income from various recording and publishing contracts. The BVI Companies as personal assets of Marley would have become estate property upon his death, resulting in the estate's receipt of all of the royalty income due him. But defendants advised Rita Marley to forge her husband's signature on three documents transferring the ownership of the BVI Companies from Bob Marley to herself. The documents were pre-dated to 1978 to make it appear that Marley had made these transfers during his lifetime, thereby excluding them from estate property. Steinberg signed the documents as a witness.

Ownership of the BVI Companies was then transferred to a Netherlands Antilles company known as Music Publishing Companies of Bob Marley, N.V. (The NV or Netherlands Antilles Company), whose sole shareholder was Rita Marley. Later the BVI Companies were liquidated, their royalty-producing assets transferred to the NV Company and then, in turn, to a wholly-owned Dutch subsidiary, Bob Marley Music

B.V. (the BV or Dutch Company). The result was that various amounts of royalty and other income rightfully belonging to the BVI Companies--and indirectly to the estate--were funneled between bank accounts in the names of Steinberg, the NV Company, and the BV Company and subsequently transferred into Rita Marley's personal account or into special escrow accounts set up in Zolt's name.

2. The Almo Scheme. This scheme is set forth in a letter dated December 29, 1981. It involved a signed agreement between Zolt, Steinberg, and Rita Marley not to report to the estate Bob Marley's personal share of royalty checks received from Almo Music, a music administration company for Bob Marley's song publishing activities. These royalty payments totaled about $1 million for the two years from the DATE of Marley's death until 1983.

3. The Island Assignment Scheme. Under this plan Rita Marley forged her late husband's signature on an assignment, again signed by Steinberg as a witness. The document, backdated to August 13, 1980, assigned Bob Marley's individual rights under contracts with Island Records to one of the BVI Companies, causing the royalties produced under those contracts to be transferred to the bank accounts of the NV Company and BV Company mentioned above, rather than to the estate.

4. The Rondor Scheme. This scheme was accomplished by assigning the assets of Tuff-Gong Productions Ltd. (Tuff-Gong Delaware), a company individually owned by Bob Marley that would have been estate property, to one of the BVI Companies. The assignment was dated as of November 30, 1980 but actually made after Bob Marley's death. It stated that the assets were transferred for the alleged consideration of $100,000, although the copyrights at issue generated millions in royalties from 1980 to 1985.

C. The Concealment

On December 17, 1981 letters of administration for Marley's estate were issued to co-trustees Rita Marley, Mutual Security Merchant Bank & Trust Company, a Jamaican bank, and George Desnoes, a prominent Jamaican attorney. Mutual Security, acting through George Louis Byles, its managing director, had primary responsibility for administering the estate. At a meeting to examine the estate's assets and liabilities, Steinberg told Byles, Rita Marley, Steinberg, and Zolt were present, Steinberg *558 specifically indicated that the BVI Companies were not part of the estate because they had been transferred to Rita Marley before Bob Marley's death.

On June 14, 1982 Byles called another meeting in Jamaica, attended by Zolt, Steinberg, Desnoes and Rita Marley. When Byles again inquired about the ownership of the BVI Companies, Steinberg gave him copies of the forged share transfers, dated June 6, 1978, showing that Bob Marley transferred his shares in the companies to Rita Marley before his death. Steinberg and Zolt also represented to Byles that the assets of Tuff-Gong Delaware barely exceeded that company's liabilities.

Defendants further led Byles to believe that Bob Marley had assigned his contract rights with Island Records to one of the BVI Companies. In accounting to the estate over the next six years, defendants reported only minimal amounts of royalty proceeds, failing to remit to the estate millions of dollars they had received and transferred to bank accounts of the NV Company, the BV Company, Rita Marley, Steinberg, and Zolt.

D. THE SUIT

On December 10, 1986 Mutual Security, in its capacity

as administrator of the estate, filed the instant case against Zolt, Steinberg, and their affiliated firms. Rita Marley was not named as a defendant, although there is an action by the estate pending against her in Jamaica and she was subsequently named as a third-party defendant in the instant case. In March of 1987 J. Reid Bingham, having been appointed ancillary administrator of the estate in New York, was substituted as the plaintiff in the instant litigation. Additional defendants were named, including several other law firms from which Steinberg had leased offices, a tax lawyer Steinberg and Zolt had hired, and the firm were the tax lawyer practiced law (collectively "other law firms"). The suit alleged violations under the Racketeer Influenced and Corrupt Organizations Act (RICO). Specifically 18 U.S.C. s 1962, and causes of action for conversion, fraud breach of fiduciary duty, negligence, and gross negligence for improperly diverting the estate's assets.

A jury trial began on August 5, 1992 and lasted 12 weeks. With respect to damages, the estate submitted an accounting report stating that between 1981 and 1986, $13.4 million had been diverted from the estate. This amount was comprised of $2.9 million in bank accounts existing at the date of Marley's death and $10.5 million in royalties received after his death. After crediting defendants for funds diverted and subsequently recovered by the estate and for payments acknowledged to be legitimate, the estate sought $9.7 million in compensatory damages plus $1 million in consequential damages incurred in accounting costs.

The jury was given a 72-question special verdict sheet. Steinberg and Zolt were found liable for three RICO counts under 18 U.S.C. s 1962(b), (c) and (d), breach of their fiduciary duty, common law fraud, conversion, negligence, and gross negligence. The jury found the other law firm defendants not liable for any of the estate's damages. In addition, the jury

was asked to determine when the estate actually knew of defendants' alleged wrongful acts. It found the estate had actual knowledge of the wrongful acts before December 19, 1982, more than four years before suit was brought. However, based upon the jury's findings that all of the RICO damages occurred after December 31, 1982, the district court concluded that the estate's RICO claims were not time-barred. See Bingham v. Zolt, 823 F.Supp. 1126, 1130 (S.D.N.Y. 1993)

On January 8, 1993 the district court entered judgment based on the jury's verdict for the estate and against Steinberg and Zolt for $2, 861,409.79 in compensatory damages, and, in addition, for $1,000,000 against Steinberg in punitive damages. Compensatory damages consisted of $800,000 in RICO damages, trebled to $2,400,000 pursuant to 18 U.S.C. s 1964 (C), $250,000 in damages pursuant to the estate's common law claims, and prejudgment interest on the common law claims in the amount of $211,409.79. The common law awards were left standing even though the district court dismissed the negligence, gross negligence, and conversion claims as time-barred. Plaintiff was also awarded, pursuant to RICO, its reasonable *559 attorney's fees. Steinberg and Zolt were jointly and severally liable, but for purposes of contribution the jury found that Steinberg was liable for 75 percent and Zolt for 25 percent of this award.

In response to defendants' post-trial motions, the district court determined that the punitive damages award was erroneous to the extent it was based on the RICO claims. As a result, the trial court reduced it to $250,000. See Bingham, 823 F.Supp. At 1135. On July 21, 1993 an amended judgment was therefore entered awarding the estate $2,861,409 in damages against defendants consisting of the trebled RICO award, common law damages and prejudgment interest upon the common law award, $3,029,428.46 in attorney's fees and

disbursements, and $250,000 in punitive damages against Steinberg. From this judgment, Steinberg and Zolt appeal. For the reasons discussed below we affirm.

DISCUSSION

On appeal defendants Steinberg and Zolt attack the judgment, charging that the estate's civil RICO claims were time-barred, the estate lacked standing, the jury's verdict was inconsistent, the damages awards were improper, and attorney's fees were improperly awarded under RICO. Several additional issues are raised. All will be addressed in order.

I RICO Claims Not Time-Barred

Analysis turns first to the statute of limitations. As detailed above, defendants were found liable for funnelling millions of dollars in royalty payments out of the estate through various schemes. Companies and contract rights were fraudulently transferred out of the estate in order to facilitate the diversion of many royalty checks into defendants' bank accounts. The jury found the estate had actual knowledge of defendants' wrongful acts more than four years prior to suit, but that it had suffered $1,050,000 in injuries--of which $800,000 were allocated as RICO injuries--after December 31, 1982. The district court ruled that the estate's previous knowledge of the underlying wrongful acts did not bar its action as to these RICO injuries under the "separate accrual" rule of Bankers Trust Co. V. Rhoades, 859 F.2d 1096 (2d Cir 1988), cert. Denied, 490 U.S. 1007, 109 S. Ct. 1643, 104 L. Ed. 2d 158 (1989)

No specific limitations period is provided in the RICO statute. The Supreme Court announced a uniform four-year limitations period for civil RICO actions but expressly declined to decide the question of when such civil RICO actions accrue. See Agency Holding Corp. V. Malley-Duff & Assocs. Inc, 483

U.S. 143, 156-57, 107 S. Ct. 2759, 2766-67, 97 L.Ed 2d 121 (1989). The result has been a split among the circuits generating as many as half a dozen conflicting accrual rules. See generally Mary S. Humes. Note, RICO and a Uniform Rule of Accrual, 99 Yal L.J. 1399 (1990); Paul B. O'Neill, Note, "Mother of Mercy, Is This the Beginning of RICO?": The Proper Point of Accrual of a Private Civil RICO Action, 65 N.Y.U. L. Rev. 172 (1990); see also In re Integrated Resources Real Estate Ltd. Partnerships Sec. Litig., 850 F. Supp 1105, 1116-17 and 1117 n. 8 (S.D.N.Y. 1993) (summarizing the conflict). A civil RICO action has been held to accrue upon, inter alia, the commission of the last predicate act, see e.g., County of Cook v. Berger 6348 F.Supp. 433 (N.D. Ill. 1986), plaintiff's discovery of the last predicate act, see, e.g., Keystone Ins. Co. V. Houghton, 863 F. 2d 1125 (3d Cir 1988), or plaintiff's discovery of his resulting injuries, see, e.g., La Porte Constr. Co. V. Bayshore Nat'l Bank, 805 F.2d 1254 (5th Cir 1986)

[1] In this Circuit we recognize a "separate accrual" rule under which a new claim accrues, triggering a new four-year limitations period, each time plaintiff discovers, or should have discovered, a new injury caused by the predicate RICO violations. See Cruden v. Bank of New York, 957 F.2d 961, 977 (2d Cir 1992); Bankers Trust, 859 F.2d at 1102; accord State Farm Mut.. Auto. Ins. Co. V. Ammann, 828 F2d 4,5 (9th Cir. 1987). In Bankers Trust, defendants, officers of a bankrupt corporation fraudulently concealed assets of the bankruptcy estate through a complicated series of transactions, and instituted frivolous lawsuits against plaintiffs to prevent them from recovering a legitimate debt. See 859 F.2d at 1098-99. Plaintiffs *560 incurred various legal fees and expenses over time, besides the loss of the debt itself. (The loss of debt claim, although not time-barred, was dismissed without prejudice because its amount was speculative. See id. At 1105-06.)

Noting that in enacting RICO, Congress had in mind the possibility of "multiple and independent [injuries] that occur over a broad span of time," we held that a rule permitting a new cause of action to accrue with each independent injury was "[t]he logical end result." Id at `1103.

[2] A necessary corollary of the separate accrual rule is that plaintiff may only recover for injuries discovered or discoverable within four years of the time suit is brought. See id at 1104-05. As long as separate and independent injuries continue to flow from the underlying RICO violations--regardless of when those violations occurred--plaintiff may wait indefinitely to sue, but may then win compensation only for injuries discovered or discoverable within the four-year "window" before suit was filed, together, of course, with any provable future damages. See Bankers Trust, 859 F2d at 1103.

(3) In holding that the estate could recover from defendants for RICO injuries occurring after December 31, 1982, the district court correctly applied our separate accrual rule. Defendants point to one of our recent decisions, issued after trial was concluded in this case, which they believe indicates the district court was in error. See Long Island Lighting Co. V. Imo Indus., Inc., 6F.3d 876, 887 (2d Cir 1993) (LILCO). In LILCO plaintiff purchased generators in 1973, received them in 1976 and 1977, but kept them in storage until 1981. When plaintiff began testing and installation the generator crankshafts failed, resulting in massive repair, replacement and financing costs. See id. At 879-81. We affirmed the district court's holding that because LILCO knew or should have known the crankshafts were defective no later than 1977, all of its civil RICO claims were time-barred when it brought suit in 1985. See id. At 887. Defendants assert that LILCO conclusively demonstrates the civil RICO limitations period is not automatically triggered each time new injuries flow from

predicate wrongful acts.

Defendants misapprehend the import of LILCO; it is not a multiple-injury case in the sense of Bankers Trust. The financial losses suffered by LILCO after 1981 were not "new and independent injur[ies]," Bankers Trust, 859 F.2d at 1103 (emphasis added), that would cause the accrual of a new limitations period. LILCO's civil RICO case of action accrued when it learned, or should have learned, that the generators were defective--that is, that it had incurred the actionable injuries of receiving defective generators in derogation of its contract and warranty rights. The additional financial losses that resulted from LILCO's decision to use the defective equipment were not independent from that original injury. Accord Glessner v. Kenny 952 F2d 702, 708 (3d Cir. 1991) (under injury-discovery rule, costs of continuing to service and ultimately replacing defective oil furnace "could not be considered a 'further injury' sufficient to revive the RICO cause of action")(citing Bankers Trust).

LILCO's post 1981 losses did not revive its civil RICO claim because non-independent injuries will not cause a new limitations period to accrue. Had LILCO brought timely suit in 1977 before the generators were installed, its recovery would have been limited to the cost of replacing the equipment, plus provable consequential damages, such as loss of business through delay. It could not have recovered all the expenses it actually incurred after 1981 for installation, repair, and damage caused by breakdown of the defective crankshafts. By deciding to install, use and repair the defective equipment, LILCO increased its losses attributable to the underlying injuries it suffered when the defendant delivered the defective generators. But those newly-incurred expenses were not sufficiently independent from the original injuries to start a new civil RICO limitations period running. Nor would it make sense to give

plaintiffs the power to restart the limitations clock in this way.

To reach the conclusion that plaintiff's later losses did not restart the civil RICO clock, LILCO reasoned that all the damage done to the plaintiff could be clearly ascertained at the time it knew or should have known it purchased defective goods: * 561 "LILCO's injury was not in any sense speculative at that juncture, and its RICO claims accrued at that time." LILCO 6f3d at 887. Thus, the injury to LILCO was complete before it installed and used the faulty generators--there was no subsequent new injury to trigger a new limitations period. The speculative-versus-determinable language corresponds in practice to the underlying notion that a new and independent injury must occur to give rise to a separately-accruing civil RICO action under the rule of Bankers Trust. It does not mean, as defendants suggest, that newly-incurred injuries never restart the RICO clock.

The speculativeness language of LILCO was taken from Cruden, 957 F2d. 961, a civil RICO accrual case occurring in a single-injury context. In Cruden, plaintiff debenture holders brought a civil RICO action against the issuer premised on fraud. Although the fraudulent acts alleged had occurred more than four years prior to suit, we held the RICO claim timely because it did not accrue until the debentures went into default--that is, until an injury occurred. See id. At 977-78. Plaintiffs had no cause of action before default, since up until that time the possibility of damages was "speculative [and] their amount and nature unprovable." Id. At 977, 91 S. Ct 795, 806, 28 L. Ed. 2d 77 (1971)). Upon default, however, the full value of the debentures became due immediately and the cause of action accrued. What would have been a stream of future income absent default became a single injury upon default. Cruden thus addresses the accrual of a civil RICO action based on a single injury rather than several successive injuries. Although the

speculativeness rule might be helpful in analyzing whether each of a series of injuries is sufficiently ripe for a RICO cause of action to accrue, that rule does not determine whether successive injuries are sufficiently independent to cause re-accrual.

We think the instant case is closer factually to Bankers Trust than to either LILCO or Cruden, as it involves a continuing series of fraudulent actions undertaken to divert and conceal assets and income. A variety of schemes were employed, involving frequent misappropriations of discrete amounts of money from different sources, such as various royalty payments owing to Marley's BVI Companies and payments from Alamo Music. Defendants were found guilty of funneling royalty checks out of the estate from the time of Marley's death to the commencement of this litigation, and each illegal diversion constituted a new and independent legally cognizable injury to the estate. As a consequence, with each diversion a new civil RICO cause of action accrued, with a corresponding four-year limitations period, and plaintiff's action is timely with respect to all diversions occurring within four years of suit. We hold therefore that the estate's RICO Action against defendants was not barred by the statute of limitations.

We note parenthetically there are no future injuries at issue in this case: the companies and contract rights generation future income streams have been restored to the estate. Were there, under somewhat different facts, a prospect of continuing diversions, plaintiff would of course have been entitled to recover such future damages as were provable. See Bankers Trust 859 F2d. At 1103. We need not decide, in the case at hand, whether a plaintiff would be prohibited from bringing a series of suits when future damages are provable in an earlier action, but plaintiff elects not to seek such damages until a later time.

II. THE ESTATE'S STANDING

[4] Defendants next contend the estate lacked standing to assert causes of action belonging to the diverted corporations. Their argument is based on the general principle that a shareholder cannot sue in his individual capacity to redress wrongs inflicted upon a corporation in which he holds stock. See, eg Manson v. Stacescu, 11 f.3d1127, 1131 (2d Cir 1993), cert denied, --U.S. --, 115 S.Ct 292, 139 L. Ed. 2d 206 (1994); Green v. Victor Talking Mach. Co., 24 f. 2d378, 380-81 (2d Cir.), cert denied, 278 U.S. 602, 49 S. Ct. 9, 73 L.Ed 530 (1928)

[5][6] When the claim is that corporate property has been recovered from the corporation, it is the corporation--having an independent *562 legal identity--that must seek, on its own or derivatively, to redress its injury. The shareholder in such a case is injured only as a result of the injury to another, i.e., the corporation, and therefore generally lacks standing. On the other hand, where the individual owns property--cash, real estate, or shares of stock--and that property is stolen, the individual suffers an injury personal to him and no other. In such a case it is only the individual that may properly seek to redress his injury.

For the most part defendants' contention rests on a mischaracterization of the causes of action alleged. This mischaracterization is most clearly seen with respect to the "Almo Scheme" and the "Island Assignment Scheme." In each case the contract rights and royalty checks diverted had been the personal property of Bob Marley. This property would have then passed to the estate upon his death. Defendants' schemes shifted these rights from Bob Marley's estate to themselves.

There is no doubt that the estate has standing to assert claims based on these schemes.

While seemingly more complex, the "Share Transfer Scheme" is conceptually identical to the two other schemes. Plaintiffs' claim is not so much that assets were stolen from the BVI Companies, but rather that the BVI Companies themselves were stolen from the estate. The BVI Companies were wholly-owned by Bob Marley and, again , would have become estate property upon his death. Defendants, by means of Rita Marley's forgery of Bob Marley's signature, transferred ownership of the BVI Companies out of the estate. Hence, it is the estate, and not the companies themselves, that has suffered an injury. The injury is complicated by defendants' subsequent liquidation of the BVI Companies, but this fact does not alter the underlying analysis that the estate was deprived of property--the BVI Companies-- that it rightfully owned.

Defendants' characterization does hold true, however, for the so-called "Rondor Scheme." That scheme involved the transfer of assets from Bob Marley's wholly-owned Tuff-Gong Delaware to one of the BVI Companies. Thus, it was Tuff-Gong Delaware that suffered an injury and not the estate. The estate's only injury is as the sole shareholder of that corporation. Nonetheless, to the extent plaintiffs' claims pertained to this scheme, it has standing to sue.

We have recognized an equitable exception in estate cases--disregarding the separate status of the estate-shareholder and the corporation "to prevent fraud or to achieve equity." Musico v. Champion Credit Corp., 764 F.2d 103, 108-10 (2d Cir. 1985) (internal quotes omitted). We have also permitted a shareholder to sue directly when the defendant owes a direct legal duty to the shareholder. See Ceribelli v. Elghanayan, 990 F.2d 63, 64 (2d Cir. 1993). Zolt and Steinberg, Bob Marley's accountant and lawyer, owed fiduciary duties income breached

that duty. Consequently, even in the schemes where the estate as well as equitable considerations confer standing on plaintiff in this action.

III. No Need to Reconcile Jury Verdict

Zolt maintains, as a third challenge, that the district court erred in denying his counsel's request to submit two additional special verdict questions to the jury to clarify its allegedly inconsistent findings that the estate had actual knowledge of defendants' wrongful acts and that plaintiff justifiably relied on knowledge of defendants' false representations. Counsel's two suggested questions were:

(1) "State whether the estate had actual knowledge of the wrongful acts of defendant Marvin ZOLT prior to December 10, 1982" and (2) "If the answer to the foregoing is 'yes.' state when the estate acquired actual knowledge of the wrongful acts of Marvin ZOLT." ZOLT reasons these questions were essential because if at all pertinent times the estate had actual knowledge of defendants' wrongdoing, plaintiff would not be able to satisfy the required element of justifiable reliance of defendants' representations to establish a claim for fraud.

[7] Where there is an alleged inconsistency in a jury's verdict, the trial court is obliged to harmonize the dissonance, if such *563 is fairly possible. See Auwood v. Harry Brandt Booking Office, Inc., 850 F.2d 884, 891 (2dCir. 1988); see also Atlantic & Gulf Stevedores, Inc. V. Ellerman Lines, Ltd., 369 U.S. 355, 364, 82 S.Ct. 780, 786, 7 L.Ed.2d 798 (1962) ("where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way").

[8] It is our task in reviewing the record to ascertain whether the trial court's reconciliation of the apparently inconsistent verdict is a reasonable reading of the record. See Royal Cup, Inc. V. Jenkins Coffee Serv., 898 F.2d 1514, 1519

(11th Cir. 1990). According to the jury's determination, the estate had actual knowledge of the defendants' misconduct by December 10, 1982, four years before suit was filed. Hence, from that point forward no fraud claim could successfully lie because plaintiff would not be able to prove that it justifiably relied on defendants' false representations. However, from June 3, 1981, the latest DATE at which Mutual Security first became involved in the estate, until December 10, 1982 there is an 18-month window of opportunity when defendants may have committed fraud unknown to plaintiff. From the recitation of the facts we know that at least several meetings were held where defendants, misrepresentations during that 18-month period.

[9] Further, the district court properly instructed the jury on the elements of plaintiffs' causes of action, including the fraud case, against defendants. There is a strong presumption that the jury in reaching its verdict complied with those instructions. See United States v.Casmento, 887 F.2d 1141, 1151 (2d Cir. 1989), cert. Denied, 493 U.S. 1081, 110 S.Ct. 1138, 107 L.Ed.2d 1043 (1990). A jury's verdict reached after proper instructions must be upheld where there is a reasonable explanation for the jury's seemingly inconsistent answers. In the case at bar, a plausible explanation of the jury's verdict existed--the fraud occurred prior to the estate's actual knowledge of defendants' wrongdoing. As a consequence, the district court's reconciliation was a fair explanation that eliminated the alleged inconsistency. It was not therefore an abuse of discretion for the court to refuse to submit counsel's proposed additional questions to the jury.

IV. Damages Awards

A. Compensatory Damages Properly Determined

[10] Steinberg maintains, as a fourth point, that the district court wrongly formulated the measure of damages

suffered by the estate. He avers it was error to accept plaintiff's proposed measure of damages, i.e., that it could recover as compensation all the money that went to the estate's "offshore" companies and bank accounts regardless of where the money eventually ended up. According to Steinberg, the estate suffered no loss because the funds from the estate's "offshore" companies and its bank accounts were distributed to estate beneficiaries who were entitled to receive them or were used to pay for the estate's legitimate expenses.

[11][12] As "the measure of damages upon which the factual computation is based is a question of law," this question is subject to de novo review. Wolff & Munier, Inc. V. Whiting-Turner Contracting Co., 946 F.2d 1003, 1009 (2d Cir.1991) (internal quotes omitted). Defendant's argument is fundamentally flawed, to the extent that he incorrectly assumes that the beneficiaries of the estate are indistinguishable from the estate itself. An estate, of course, is an entity separate and distinct from its beneficiaries. See In re Dolcater, 106 F.2d 30, 31 (2d Cir. 1939) (in suit to recover funds fraudulently extracted from an estate, any recovery will be for the benefit of the estate; such a suit may only be brought by the estate, unless beneficiaries prove the executors of estate have refused to bring suit or that a request to do so would be futile). The district court followed this rule when it instructed the jury not to consider Rita Marley's entitlement, if any, as an estate beneficiary, noting that such matters were issues for the Jamaican probate court. We recognize that neither *564 Rita nor any other beneficiary can receive a double recover--royalty payments paid from the unlawfully diverted song rights plus these same amounts as a component of compensatory damages paid to the estate for ultimate distribution to beneficiaries. But with the estate still in probate at the time of this damages action, it was not error to instruct the jury as the trial judge did. Once

the amounts due the beneficiaries are ascertained in the probate proceeding, appropriate applications may be made to the Jamaican probate court or the trial court in this case to avoid a double recovery to the beneficiaries.

In addition, the trial court properly instructed the jury that the measure of damages could be reduced if the funds were used to pay legitimate estate obligations and plaintiff would at the time have authorized the payments to be made on its behalf. This instruction is analogous to the rule that states: "A tortfeasor cannot diminsh the amount of recovery by paying a debt of the injured person without the latter's consent...." Restatement (Second) of Torts s 923 (1979); see also D&G Equip. Co. V. First Natl Bank, 764 F.2d 950, 959 (3d Cir 1985) ("A depositary or collecting bank, which seeks to establish a defense of mitigation by virtue of payment of the plaintiff's debts, must therefor offer proof that the converted monies were used to discharge the specific debts which the plaintiff would have elected to pay at the time the conversion occurred.").

Since a jury is presumed to comply with its instructions, see Casament, 887 F.2d at 1151, the resulting verdict already accounted for any estate expenses paid by defendants that plaintiff would have authorized. Hence, the compensatory damages award was proper.

B. Post-Judgment Dismissal of Common Law Claims: Effect on Damages Award

[13] As part of its further questioning of the damages awards, Steinberg insists it was error to sustain any part of the jury's awards of compensatory and punitive damages that were based upon the estate's dismissed common law claims.

Defendant contends that when the district court set aside plaintiff's claims for conversion, negligence, and gross negligencce as time-barred, it was required as a matter of law to vacate the jury's common law damages award of $250,000. He

reasons the jury returned a lump sum award predicated upon all five of the estate's common law claims and it is impossible to determine which part of the jury's award, if any, is attributable to the dismissed claims and which part to the surviving claims. Thus, Steinberg concludes there is no way to know whether or not the invalid claim was the sole basis for the verdict. See United New York and New Jersey Sandy Hook Pilots Ass'n v. Halecki, 358 U.S. 613, 619, 79 S.Ct. 517, 520, 2 L.Ed.2d 541 (1959); see also Morrissey v. National Maritime Union of Am., 544 F.2d 19, 26 (2d Cir. 1976) ("The General rule is that when one of the two claims that have been submitted to the jury should not have been submitted, a general verdict... cannot stand.").

[14] This conclusion misses the mark. The jury did not return a general verdict, leaving the court uncertain as to liability on plaintiff's other claims. Rather, its special verdict found defendants liable on each common law claim. Plaintiff is entitled to recover its full measure of compensatory damages, despite the dismissal of certain common law claims, because each claim presented an alternative theory of liability based upon the same set of facts, the same series of acts, and the same injuries caused by the same actors. Whether or not a defendant is liable to a plaintiff under one or many theories of liability does not affect the damages award because the amount of compensatory damages awarded is not dependent on the number of theories that plaintiff alleges and under which it may recover. Rather, the amount of damages depends on the extent of the injury suffered. See Clark v. Taylor 710 F.2d 4, 8 (1st Cir 1983).

C. PUNITIVE DAMAGES AWARD

[15] Steinberg asserts, in addition, it was error not to

vacate the punitive damages award once the district court agreed that the RICO cause of action could not support punitive *565 damages. The district court reduced the punitive damages award from $1 million to $250,000 because the jury had been asked to consider an award of punitive damages on the RICO cause of action. Steinberg contends that they should have been dismissed altogether, since it was "impossible to discern on which claims the jury based its award of punitive damages." Bingham, 823 F. Supp at 1135. He further states that the punitive damages award should have been dismissed since two of the common law claims on which punitive damages were potentially founded were dismissed as time-barred.

We have expressed the view that aggregate punitive damages awards are preferable, due to the risk that "separate awards for each component of misconduct might unduly increase the amount of the total award." King v. Macri, 993 F2d 294, 299 (2d Cir 1993). Faced with such an aggregate award, the district court lowered it significantly to an amount it considered reasonable and fair. Thus, our inquiry is limited simply to whether the award is so high "as to shock the judicial conscience and constitute a denial of justice." O'Neill v. Krzeminski, 839 F.2d 9, 13 (2d Cir 1988) (internal quotes omitted). In light of the facts and circumstances of this case, we think the award completely reasonable and therefore see no reason to direct a new trial on this issue.

V. ATTORNEY'S FEES AWARD PROPER

Defendants challenge, as their fifth point, on several grounds plaintiff's award of $3,029,428.46 in attorney's fees and disbursements under RICO. Zolt tells us that attorney's fees under RICO as a matter of substantive law are subject to the parties' rights to discovery, an evidentiary hearing, and a jury

trial. Steinberg believes the estate's request for fees was reduced an inadequate 15 percent based upon the unreasonableness of certain expenses. He thinks it should have been reduced much more substantially to reflect the estate's limited success at trial. This argument is based on the fact that the jury awarded only a small part of the damages sought by plaintiff, three of plaintiff's six charges were dismissed as time-barred, and the estate prevailed against only three of eight defendants.

[16] It was not error to reject Zolt's request for a jury trial, discovery, and an evidentiary hearing. It is the trial court, not the jury, that has the responsibility of determining attorney's fees awards pursuant to statute. See Gagne v. Town of Enfield, 734 F.2d 902, 904 (2d Cir 1984) (attorney's fees under 42 U.S.C. s 1988); United States Football League v. National Football League, 704 F. Supp 474 9S.D.N.Y.) (Attorney's fees under Clayton Act, aff'd, 887 F.2d 408 (2d Cir 1989),cert denied. 493 U.S. 1071, 119 S. Ct. 1116, 197 L.Ed.2d 1022 (1990). Further, Zolt's demands do not mesh with the policy that "[a] request for attorney's fees should not result in a second major litigation." Hensley v. Eckerhart, 461 U.S. 424, 437, 103 S. Ct. 1933 1941, 76 L.Ed 2d 40 (1983). Reliance on F.H. Krear & Co. v. Nineteen Named Trustees 776 F.2d 1563, 1564 (2d Cir. 1985) (per curiam), is misplaced. Krear is inapt as it dealt with attorney's fees that were a contractually stipulated element of consequential damages, not attorney's fee pursuant to statute. Thus, no basis exists here for a jury trial to determine attorney's fees awarded pursuant to 18 U.S.C. s 1964 (c).

[17] With respect to amount, plaintiff submitted a detailed accounting of over 500 pages containing time records for the attorneys, summer clerk, and paralegal who worked on this case. The records specified the name of each individual, the DATE, the amount of time expended, the hourly rate, and the

description of the work performed. This information was supported by an affidavit provided by plaintiff's counsel. After reviewing those records, the district court found itself fully satisfied with the detailed documentation and able to determine an appropriate award without any additional discovery or evidentiary hearings. See BINGHAM, 823 F.Supp. At 1137 n. 9.

Steinberg's challenge to the award based on plaintiff's limited success at trial also lacks merit. In Hensley the Supreme Court stated, "[t] he result is what matters." See 461 U.S. at 435, 103 S.Ct. At 1940. Although plaintiff did not prevail on all of its claims *566 and the jury did not find all the defendants guilty, the plaintiff obtained a jury verdict and a judgment against defendants. It won the case. We see no abuse of discretion in the award of attorney's fees.

VI. Remaining Issues

[18] ZOLT makes a number of accusations attempting to show that the trial was conducted in an improper and prejudicial manner. For instance, he declares that plaintiff's counsel was unfairly allowed to ask him leading questions, that he was instructed at times by the trial judge to give yes or no answers, that he was threatened with contempt, that he was questioned by the trial judge in an inappropriate and unfair way, that he was prejudiced by the interruption in his testimony by two days of testimony by Steinberg, who responded to questions by invoking the Fifth Amendment, and that the jury was allowed to infer that ZOLT was lying by his failure to remember events.

A careful review of the record shows ZOLT'S characterization of the trial wholly lacking in merit. It is clear from the trial transcript that ZOLT was a hostile witness, making leading questions by plaintiff's counsel entirely proper. See *Fed.R.Evid. 611(c).* He was threatened with contempt,

out of the presence of the jury, for constantly responding beyond the questions asked, in order to blame his co-defendants. In a sidebar, the trial judge did note that the jury could infer ZOLT was lying. However, in context, it is clear the judge meant that the jury could credit documentary evidence where ZOLT claimed not to remember. More importantly, at no time did the judge instruct the jury that a witness's inability to recall constituted evidence of the facts asserted in an attorney's question. All of ZOLT'S contentions are factually baseless and, further, go to the discretionary conduct of a trial by the district judge. See Boyle v. Revici, 961 F.2d 1050, 1064 (2d Cir. 1992). We are unable to find any abuse of that discretion and discern no unfairness in the conduct of the trial. [19] Finally, Steinberg urges that RICO's pattern and enterprise requirements are unconstitutionally vague as applied to himself. His assertion relies on Justice Scalia's concurring opinion in H.J. Inc. V. Northwestern Bell Tel. Co., 492 U.S. 229, 251-56, 109 S.Ct. 2893, 2906-09, 106 L.Ed.2d 195 (1989), criticizing the Supreme Court's inability to define RICO's pattern and enterprise requirement. We have consistently held that RICO's pattern and enterprise requirements are not unconstitutionally vague. See United States v. Corio, 922 F.2d 1008, 1017 (2d Cir.), cert. Denied, 501 U.S. 1217, 111 S.Ct. 2826, 115 L.Ed.2d 996 (1991); United States v. Coonan, 938 F.2d 1553, L.Ed.2d 628 (1992).

CONCLUSION

Accordingly, for all the reasons stated, the judgment of the district court is affirmed.

APPENDIX B
(Opinions of District Court)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

J. REID BINGHAM, as Ancillary Administrator of the ESTATE OF ROBERT NESTA MARLEY,

Plaintiff,

-against-

MARVIN ZOLT; ZOLT & LOOMIS, P.C.; DAVID J. STEINBERG; BLUESTEIN, RUTSTEIN & MIRARCHI, P.C.; GREENSTEIN, GORELICK, PRICE, SILVERMAN & LAVESON; MARTIN OLINER; MARTIN OLINER, P.C.; and COUDERT BROTHERS,

Defendants

----------x

COUDERT BROTHERS; MARTIN OLINER; MARTIN OLINER, P.C.; and BLUESTEIN, RUTSTEIN & MIRARACHI, P.C.,

Third-Party Plaintiffs,

-against-

RITA MARLEY and MUTUAL SECURITY
MERCHANT BANK AND TRUST COMPANY,

Third-Party Defendants.

----------x

KENNETH CONBOY, DISTRICT JUDGE:

This case was tried over a period of twelve weeks before a jury, which returned a verdict in favor of the plaintiff and against two of the defendants, Marvin Zolt and David Steinberg. After the verdict, all the parties made motions seeking to alter or amend the case. The Court decided these motions by Opinion and Order on June 16, 1993.

Marvin Zolt has since moved this Court to grant reargument on the Court's Opinion, to grant a new trial of the plaintiff's RICO and state law fraud claims, and to stay enforcement of the judgment. Mr. Zolt bases his motion on the fact that the Court did not ask the jury to find the exact date when the Estate acquired actual knowledge of the defendant's wrongdoing.

The Court denies defendant Zolt's motion and affirms its Opinion and Order from June 16, 1993. It is the Court's duty to harmonize the answers of the jury "if it is possible under a fair reading of them." *Auwwod v. Harry Brandt Booking Office, Inc.*, 850 F.2d 884, 891 (2d Cir. 1988), *citing*, C. Wright & A. Miller, Federal Practice and Procedure §2510, at 515 (2d ed. 1971). The Court has done so, and we therefore believe that the reasoning as set forth in the Court's Opinion is sound (*See* Opinion and Order at 4-6). In addition, we observe that the Estate's actual knowledge of defendant's wrongful conduct is

only relevant for the purposes of the fraud claim. *See* Opinion and Order, at 3,6 n.4.

Accordingly, the defendant Mr. Zolt's motion is denied.

SO ORDERED.

Dated: New York, New York
June 28, 1993

Kenneth Conboy, U.S.D.J.

J. Reid Bingham, as Ancillary Administrator of the Estate of Robert Nesta Marley,

Plaintiff

v.

Marvin Zolt, Zolt & Loomis, P.C.; David J. Steinberg; Bluestein, Rutstein & Mirarchi, P.C.; Greenstein, Gorelick, Price Silverman & Laveson; Martin Oliner; Martin Oliner, P.C.; and Bluestein, Rutstein & Mirarchi, P.C.,

Third-Party Plaintiffs,

v.

Rita Marley and Mutual Security Merchant Bank and Trust Company,

Third-Party Defendants.

No. 86 Civ. 9477 (KC).

United States District Court,

S.D. New York.

June 16, 1993.

Estate of singer brought action against singer's former legal and financial advisors under Racketeer Influenced and Corrupt Organizations Act (RICO). The District Court, Conboy, J., held that: (1) estate's RICO claims were not barred by statute of limitations, despite fact that advisors' wrongful acts and estate's awareness of wrongful acts occurred more than four years before estate brought suit, and (2) estate's request for attorney fees and disbursements in amount of $3,564,033.48 would be reduced by 15%.

So Ordered.

[1] Limitation of Actions K58 (1)

241k58 (1)
Civil Racketeer Influenced and Corrupt Organizations Act (RICO) claims brought by estate of singer against singer's former legal and financial advisors were not barred by statute of limitations, despite fact that advisors' wrongful acts, and estate's awareness of wrongful acts all occurred more than four years prior to commencement of suit; key dates were when each separate injury arose and not when wrongful acts occurred or when estate became aware of wrongful acts and estate's injuries all arose within four years of commencement of lawsuit. 18 U.S.C.A. §1961 et seq.

[1] Limitation of Actions k95 (3)
241k95 (3)
Civil Racketeer Influenced and Corrupt Organizations Act (RICO) claims brought by estate of singer against former legal and financial advisors were not barred by statute of limitations, despite fact that advisors' wrongful acts, and estate's awareness of wrongful acts all occurred more than four years prior to commencement of suit; key dates were when each separate injury arose and not when wrongful acts occurred or when estate became aware of wrongful acts and estate's injuries all arose within four years of commencement of lawsuit. 18 U.S.C.A. § 1961 et seq.

[2] Limitation of Actions k201
241k201
District court would harmonize apparently inconsistent jury verdicts that singer's estate had actual knowledge of wrongful acts committed by singer's former legal and financial advisors four years prior to commencement of fraud action and that estate justifiably relied on false representations made by advisors and hold that there was two-year window between time that six-

year New York statute of limitations began to run on fraud claim was not barred by six-year statute of limitations; jury was properly instructed on elements of estate's claims against advisors and all of their defenses to these claims and there was strong presumption that jury properly followed these instructions.

[3] Federal Civil Procedure k2197
170Ak2197
Where there is alleged inconsistency in jury's verdict, it is duty of court to attempt to harmonize answers, if it is possible under fair reading of them.

[4] Federal Civil Procedure k1974.1
179Ak1974.1
There is strong presumption that jury properly followed court's instructions.

[5] Federal Civil Procedure k 2197
170Ak2197
Court must uphold verdict of properly instructed jury if there is any plausible explanation for purported inconsistency in their verdict.

[6] Estoppel k52.10 (2)
156k.10 (2)
Both waiver and estoppel require showing not only of knowledge on part of plaintiff, but also intent element which is separate and distinct from finding of actual knowledge.

[7] Principal and Agent k 163 (1)
08k163 (1)
Ratification does not occur where principal must affirm

transaction to protect his own interests.

[8] Principal and Agent k170(3)
308k170 (3)
Alleged failure of singer's estate to repudiate tax structure did not constitute ratification of unauthorized acts of singer's former legal and financial advisors; there was ample evidence that any action taken by estate with respect to tax structure was necessary to protect its interests and to avoid further loss and advisors did not contradict estate's argument that such affirmation was necessary to protect its interests.

[9] Racketeer Influenced and Corrupt Organizations k2
319Hk2
Racketeer Influenced and Corrupt Organizations Act (RICO) statute and its pattern of racketeering activity requirement were not unconstitutionally vague as applied to deceased singer's former legal and financial advisors in civil RICO action brought by singer's estate. 18 U.S.C.A. § 1961 et seq.

[10] Attorney and Client k22
45k22
Testimony of attorney who was ancillary administrator of singer's estate was admissible in estate's civil Racketeer Influenced and Corrupt Organizations Act (RICO) action against singer's former legal and financial advisors; code of professional responsibility section precluding attorney from testifying as witness in action he is litigating was inapposite because attorney was not representing estate in RICO action, main areas addressed in attorney's direct testimony were clearly subjects in which he was personally involved, any conflict of interest attorney may have had went to his credibility and did

not affect admissibility of his testimony and nature and extent of attorney's alleged conflicts of interest and bill were subject of extensive and vigorous cross-examination. ABA Code of Prof. Resp., DR 5-102; 18 U.S.C.A. s 1961 et seq.

[10] Witnesses k67
410k67
Testimony of attorney who was ancillary administrator of singer's estate was admissible in estate's civil Racketeer Influenced and Corrupt Organizations Act (RICO) action against singer's former legal and financial advisors; code of professional responsibility section precluding attorney from testifying as witness in action he is litigating was inapposite because attorney was not representing estate in RICO action, main areas addressed in attorney's direct testimony were clearly subjects in which he was personally involved, any conflict of interest attorney may have had went to his credibility and did not affect admissibility of his testimony and nature and extent of attorney's alleged conflicts of interest and bill were subject of extensive and vigorous cross-examination. ABA Code of Prof. Resp., DR 5-102; 18 U.S.C.A. s 1961 et seq.

[11] Evidence k377
157k377
Trial court did not err in admitting report from accounting firm and in allowing accounting firm's senior manager to testify about report I civil Racketeer Influenced and Corrupt Organizations Act (RICO) action brought by deceased singer's estate against singer's former legal and financial advisors; report was proffered by estate as evidence of amount of money which was not remitted to estate report was directly relevant to issue of damages, manager had qualifications that made for reliable and authoritative expert witness and manager's expert testimony

assisted trier of fact to understand evidence of to determine fact in issue. Fed. Rules Evid. Rule 702, 28 U.S.C.A.

[11] Evidence k518
157k518
Trial court did not err in admitting report from accounting firm and in allowing accounting firm's senior manager to testify about report I civil Racketeer Influenced and Corrupt Organizations Act (RICO) action brought by deceased singer's estate against singer's former legal and financial advisors; report was proffered by estate as evidence of amount of money which was not remitted to estate report was directly relevant to issue of damages, manager had qualifications that made for reliable and authoritative expert witness and manager's expert testimony assisted trier of fact to understand evidence of to determine fact in issue. Fed. Rules Evid. Rule 702, 28 U.S.C.A.

[11] Racketeer Influenced and Corrupt Organizations k78
319Hk78
Trial court did not err in admitting report from accounting firm and in allowing accounting firm's senior manager to testify about report I civil Racketeer Influenced and Corrupt Organizations Act (RICO) action brought by deceased singer's estate against singer's former legal and financial advisors; report was proffered by estate as evidence of amount of money which was not remitted to estate report was directly relevant to issue of damages, manager had qualifications that made for reliable and authoritative expert witness and manager's expert testimony assisted trier of fact to understand evidence of to determine fact in issue. Fed. Rules Evid. Rule 702, 28 U.S.C.A.

[12] Evidence k146
157k146

Probative value of testimony that singer's former legal advisor retained interest in funds diverted from singer's estate significantly outweighed danger of unfair prejudice, confusion on issues or misleading jury and therefore, testimony was admissible in estate's civil Racketeer Influenced and Corrupt Organizations Act (RICO) action against advisor; testimony regarding advisor's retention of interest in diverted funds was relevant on issue of intent since it demonstrated that advisor was using, without authorization, funds diverted from estate for his personal use and evidence went to heart of advisor's defense that he acted at all times in good faith with respect to estate matters, 18 U.S.C.A. s 1961 et. seq.; Fed. Rules Evid. Rule 403, 28 U.S.C.A.

[13] Pretrial Procedure k42

307Ak42

Witness' rebuttal testimony regarding valuation of music assets of singer's estate was properly admitted in estate's civil Racketeer Influenced and Corrupt Organizations Act (RICO) actions against singer's former legal and financial advisors; estate specifically listed witness as possible expert rebuttal witness whose testimony would be used to rebut elements of advisors' case in chief relating to value of estate's music assets and estate produced witness' valuation report to advisors as soon as was practically possible. 18 U.S.C.A. s 1961 et. seq.

[14] Racketeer Influenced and Corrupt Organizations k80

319Hk80

Jury was properly precluded from considering wife's interstate share of her husband's estate in assessing damages in estate's civil Racketeer Influenced and Corrupt Organizations Act (RICO) action against husband's former legal and financial advisors; advisors failed to proffer sufficient evidence to provide

jury with sound basis for approximating with reasonable certainty amount of wife's entitlement and thus, any determination by jury as to such amount would be speculative and could not constitute proper basis for offset. 18 U.S.C.A s 1961 et seq.

[15] Racketeer Influenced and Corrupt Organizations k85
319Hk85
Proper measure of estate's damages was loss to estate and not loss to individual beneficiaries in estate's civil Racketeer Influenced and Corrupt Organizations Act (RICO) action against decedent's former legal and financial advisors; estate was entity apart and distinct from its beneficiaries and respective positions of estate's beneficiaries did not affect measurement of damages incurred by estate. 18 U.S.C.A. s 1961 et. seq/

[16] Racketeer Influenced and Corrupt Organizations k85
319Hk85
Defendants in civil Racketeer Influenced and Corrupt Organizations Act (RICO) action who were found liable as intentional tort-feasors and faithless fiduciaries were not entitled to offset for enhancement in value of assets during period of wrongdoing. 18 U.S.C.A. s 1961 et seq.

[17] Racketeer Influenced and Corrupt Organizations k80
319Hk80
Jury was properly instructed not to consider increase in value of diverted corporations in civil Racketeer Influenced and Corrupt Organizations Act (RICO) action, where defendants failed to proffer sufficient evidence on what portion of increase in value of corporations was attributable to their efforts and expenditures. 18 U.S.C.A. s 1961 et seq.

[18] Damages k60
116k60
Defendants are entitled to credit for any enhancement of value of recovered assets only if enhancement is result of defendants' efforts and expenditures.

[19] Corporations k1.6 (1)
101k1.6 (1)
Singers estate could claim as damages royalties that were owed to corporations which allegedly were diverted from singer's former legal and financial advisors; disregarding distinction between corporations and their owner, the estate, was necessary to prevent fraud and achieve equity.

[20] Racketeer Influenced and Corrupt Organizations k85
319Hk85
Punitive damage award based on civil Racketeer Influenced and Corrupt Organizations Act (RICO) violations would not be appropriate, where plaintiff received $800,000 on its RICO claims which was trebled by trial court to $2,400,000. 18 U.S.C.A. s 1961 et seq.

[21] Damages k221 (5.1)
115l221 (5.1)
It is generally sound practice not to ask jury to consider awarding separate punitive damage awards in cases involving multiple claims since such practice can artificially inflate aggregate amount awarded.

[21] Attorney and Client (4)
45k129(4)
Punitive damage award of $1 million against singer's former legal advisor based on singer's non-Racketeer Influenced and

Corrupt Organizations Act (RICO) claims would be reduced to $250,000 in interests of reasonableness and fairness to litigants; award of $250,000 was sufficient to deter similar conduct by advisor infuture and to serve as warning to others not to engage in such wrongful acts and figure bore reasonable relationship to harm done and flagrancy of conduct causing it. 18 U.S.C.A. s 1961 et seq.

[23] Witnesses k309
410k309
Singer's former legal advisor's invocation of Fifth Amendment in jury's presence in civil Racketeer Influenced and Corrupt Organizations Act (RICO) action brought by singer's estate was highly probative on issue of liability and any prejudice advisor suffered as result of invocation was not unfair; jury was properly instructed on issue of advisor's invocation of Fifth Amendment, estate presented substantial evidence against advisor apart from any proper adverse inferences consequent to his invocation of Fifth Amendment, and probative value of advisor's testimony substantially outweighed risk of unfair prejudice. U.S.C.A. Const.Amend. 5, Fed.Rules Evid.Rule 403, 28 U.S.C.A.; 18 U.S.C.A. s 1961 et seq.

[24] Federal Civil Procedure k2621
170Ak2621
Automatic presumption of good cause entitling plaintiff in civil Racketeer Influenced and Corrupt Organizations Act (RICO) action to register judgment entered in federal district of New York in federal district of Pennsylvania was not established by mere fact that defendant was Pennsylvania resident whose assets were presumably outside district of New York. 18 U.S.C.A. s 1961 et seq.; U.S.C.A. s 1963.

[25] Federal Civil Procedure k2742.5
170Ak2742.5
Civil Racketeer Influenced and Corrupt Organizations Act (RICO) plaintiff's request for attorney fees and disbursements in amount of $3,564,033.48 would be reduced by 15% to $3,029,428.46; although district court did not challenge veracity of plaintiff's figures, it did question reasonableness of certain expenses, such as billing $24,108.75 in legal fees in single day and 23 hours charged by single attorney on single day. 18 U.S.C.A. s 1964(c).
[26] Federal Civil Procedure k2737.4
170Ak2737.4
Establishment of contingent fee does not alter computation of attorney fees in manner that would eliminated expenses for hourly billing.

[27] Racketeer Influence and Corrupt Organizations k82
319Hk82
Any reduction in award of attorney fees under civil remedies section of Racketeer Influence and Corrupt Organizations Act (RICO) due to non-RICO claims would inappropriate; although non-RICO claims by themselves did not merit award of attorney fees, all of plaintiff's claims involved common nucleus of facts and were based on related legal theories. 18 U.S.C.A. s 1964 (c).

[28] Federal Civil Procedure k2737.4
170Ak2737.4
Courts have responsibility of calculating award of attorney fees which is made pursuant to statute.

[29] Racketeer Influenced and Corrupt Organizations k82
319Hk82

District court would not allow civil Racketeer Influenced and Corrupt Organizations Act (RICO) defendants to engage in any discovery or to conduct evidentiary hearing on issue of plaintiff's attorney fees under RICO, where district court was satisfied that plaintiff's documentation and detailed description with respect to legal fees and costs provided court with adequate already protracted litigation should be further extended to permit additional inquiries concerning attorney fees. 18 U.S.C.A. s 1964(c).

[30] Federal Civil Procedure k1262.1
170Ak1262.1
District court would not allow civil Racketeer Influenced and Corrupt Organizations Act (RICO) defendants to engage in any discovery or to conduct evidentiary hearing on issue of plaintiff's attorney fees under RICO, where district court was satisfied that plaintiff's documentation and detailed description with respect to legal fees and costs provided court with adequate record upon which to base award and defendants failed to demonstrate why already protracted litigation should be further extended to permit additional inquiries concerning attorney fees. 18 U.S.C.A. s 1964(c).

[30] Racketeer Influenced and Corrupt Organizations k82
319Hk82
District court would not allow civil Racketeer Influenced and Corrupt Organizations Act (RICO) defendants to engage in any discovery or to conduct evidentiary hearing on issue of plaintiff's attorney fees under RICO, where district court was satisfied that plaintiff's documentation and detailed description with respect to legal fees and costs provided court with adequate record upon which to base award and defendants failed to demonstrate why already protracted litigation should

be further extended to permit additional inquires concerning attorney fees. 18 U.S.C.A. s 1964(c).

*1129 Robert Brudige, Jr., Hughes, Hubbard & Reed, New York City, for the plaintiff.

Ray Beckerman, Gallet Dreyer & Berkey, Robert Brudige, Jr., Hughes, Hubbard & Reed, Kathryn Keneally, Kostelanetz Ritholz Tigue & Fink, Adam Simms, Brody & Fabiani, New York City, James Nunemaker, Rivkin Radler Bayhe Hart & Kremer, Uniondale, NY, Jeremy Jishkin, Montgomery, McCracken, Walker & Rhoads, Philadelphia, PA, Kaare

Phillips, Grais & Phillips, Paul D. Friedland, Coudert Brothers, New York City, for defendants.

* 1130 OPINION AND ORDER

CONBOY, District Judge:

This case was tried over a period of twelve weeks before a jury, which returned a verdict in favor of the plaintiff, J. Reid Bingham, and against two of the defendants, Marvin Zolt and David J. Steinberg. Currently before the Court are several post-trial motions from different parties to the litigation.

This Order Addresses the motions of David J. Steinberg and Marvin Zolt, the plaintiff's request to order the registration of this Judgment in the district of Pennsylvania, and the plaintiff's application for attorneys' fees and disbursements. [1]

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[1] In addition, the Court observes that defendant Marvin Zolt, in his "Supplemental Notice of Motion," filed on January 21, 1993, incorporated by reference the "grounds set forth by defendants David Steinberg in his notice of motion dated January 19, 1993." Marvin Zolt's "Supplemental Notice of Motion, "Jan. 19, 1993 at 1-2. The

A. Statute of Limitations

1. RICO Claims:

[1] Defendants claim that plaintiff's RICO claims are barred by the statute of limitations because the jury found that the Estate had actual knowledge of the defendants' wrongful acts by December 10, 1982. Defendants' argument, however, ignores the fact that under applicable Second Circuit law, the Estate's RICO claims are timely as to all RICO injuries suffered by the Estate within the four-year limitation period. See Bankers Trust Co. V. Rhoades, 859 F.2d 1096 (2d Cir.1988) ("a plaintiff may sue for any injury he discovers or should have discovered within four years of the commencement of his suit, regardless when the RICO violation causing such injury occurred." Id. at 1103), cert. denied, 490 U.S. 1007, 109 S.CT. 1642, 104 L.Ed.2d 158 (1989). Since the jury expressly found that all of the RICO damages occurred after December 31, 1982, the Court finds that all of the separate RICO injuries found by the jury occurred within four years of the commencement of the suit on December 10, 1986.

The Court observes that the fact that the plaintiff had actual knowledge of the wrongful acts by December 10, 1982 does not bar the RICO claims. The Second Circuit has made clear that the separate accrual rule is discrete from the issue of plaintiff's knowledge of the underlying RICO violations. For example, in Bankers Trust, the Court held that plaintiff could "recover for any injury it discovered or should have discovered on or after August 24, 1978" [four years prior to the suit], despite the fact that plaintiff first became aware of defendants' fraud in September 1976. 859 F.wda at 1099, 808 F.Supp. 213

Court rejects plaintiff's argument that overlooked Fed.R.Civ.P. 6(a), which provides that then computing the periods of less than eleven days, intermediate Saturdays, Sundays, and legal holidays are excluded.

(S.D.N.Y.1992) ("because a civil RICO action to recover damages for an injury does not exist until that injury has been suffered, Plaintiffs have an action for each injury sustained after May 14, 1987, notwithstanding the fact that Plaintiffs already knew of Defendants' fraudulent activity and every time they lost money as a result of Defendants' fraudulent activity and might have anticipated further harm. Plaintiffs sustained actionable injury every time they lost money as a result of Defendants' RICO claims are not barred by the statute of limitations. [2].

2. Common Law Claims:

Defendants also maintain that plaintiff's common law claims for fraud and breach of *1131 fiduciary duty are barred by the applicable statute of limitations. [3] We disagree. We have

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[2] In his "Memorandum of Law of Defendants Marvin Zolt and Zolt and Loomis, P.C., in Support of Motion Pursuant to Rules 50, 59, and 62, " filed January 23, 1993, Mr. Zolt argues that the Court must dismiss the RICO claims on the grounds that the defendants' wrongful acts, the injury to the estate, and plaintiff's awareness of the wrongful acts all occurred more than four years prior to the commencement of the lawsuit (before December 10, 1982). We disagree. As mentioned above, the key dates are when each separate injury arose, not when the wrongful acts occurred or when the plaintiff became aware of the wrongful acts. The jury explicitly found that the plaintiff's injuries all arose within four years of the commencement of the lawsuit. We do not believe that these injuries were mere continuations of an injury that had occurred outside the four-year injuries arose, the Court finds that the RICO claims are timely as to both defendants.

[3] Defendants maintain that all of plaintiff's common law claims are barred by the statute of limitations. However, neither defendant

already held that New York law governs the resolution of this dispute, and that, accordingly, the six-year New York statute of limitations applies to plaintiff's fraud and breach of fiduciary claims. See Trial Tr. 8015-16, 8499-8500. We do not believe that either the fraud or breach of fiduciary duty claim is barred by its six-year statute of limitations.

[2] Defendants also argue that plaintiff's "actual knowledge" of defendants' wrongful acts by December 10, 1982 negates plaintiff's RICO and fraud claims. We have already rejected this argument with respect to the RICO claims and do so here for the fraud claim as well. The Court recognizes that justifiable reliance is an essential element of a fraud claim (See Jury Charge, Instruction No. 64, at 71), and that there is an inconsistency between a finding that the plaintiff had actual knowledge of defendants' wrongdoing and that plaintiff justifiably relied on a false representation made by defendants. However, the Court also recognizes that the jury found that plaintiff had actual knowledge of defendants' wrongdoing by December 10, 1982, four years prior to the commencement of the suit, and there remains a two-year window in which defendants could have committed the fraud unbeknownst to the plaintiff.

[3][4] Defendants argue that since the jury found that the plaintiff had actual knowledge of defendants' wrongdoing on the earliest date upon which they could have, it is very possible that the plaintiff acquired actual knowledge of defendants' wrongdoing well before December 10, 1982, and

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specifically mentions the conversion, negligence, or gross negligence claims. In the absence of a reasoned argument with respect to these claims, and, indeed, in the absence of any argument at all, the Court will not address these issues.

that therefore there was never a justifiable reliance by the plaintiff within the applicable six-year statute of limitations for fraud. We disagree. Where there is an alleged inconsistency in the jury's verdict, " '[i]t is the duty of the court to attempt to harmonize the answers, if it is possible under a fair reading of them.' " Auwood v. Harry Brandt Booking Office, Inc., 850 F.2d 884, 891 (2d Cir. 1988), citing, C. Wright & A. Miller, Federal Practice and Procedure s 2510, at 515 (2d ed. 1971). The jury was properly instructed on the elements of the Estate's claims against defendants and all of their defenses to these claims. There is a strong presumption that the jury properly followed these instructions. See United States v. Casamento, 887 F.2d 1141, 1151 (2d Cir. 1989), cert. Denied, 493 U.S. 1081, 110 S. Ct. 1138, 107 L.Ed.2d 1043 (1990).

[5] Accordingly, a court must uphold the verdict of a properly instructed jury if there is any "plausible" explanation for the purported inconsistency in their verdict. See United States Football v. National Football League, 644 F.Supp. 1040 (S.D.N.Y. 1986) ("the Seventh Amendment imposes upon the courts a constitutional obligation to search for an interpretation of the case which reconciles the verdicts, . . . and which respects the principle that 'juries are not bound by what seems inescapable logic to judges' " id. At 1046 (citations omitted)), aff'd, 842 F.2d 1335 (2d Cir. 1988).

In this case, the jury could have easily found that the Estate "justifiably relied" on Mr. Steinberg's and Mr. Zolt's misrepresentations through 1981 and up to December 10, 1982. Mindful of the fact that the jury was properly instructed on the elements of the fraud claim, including its six-year statute of limitations, the Court will accept this highly plausible interpretation of the jury's verdict. Accordingly, we find that the plaintiff's fraud claim is not barred by the six-year statute of

limitations. [4]

*1132 B. Waiver and Estoppel

[6] Defendants argue that plaintiff's claims are barred by the doctrines of waiver and estoppel. We disagree. Plaintiff's claims are not barred by waiver or estoppel, because defendants have failed to plead, prove, or submit to the jury the elements of either of these affirmative defenses. See Steinberg v. Columbia Pictures Industries, Inc., 663 F.Supp. 706, 715 (S.D.N.Y.1987); Galvez v. Local 804 Welfare Trust Fund, 543 F.Supp. 316, 317 (E.D.N.Y 1982). Both waiver and estoppel require a showing not only of knowledge on the part of the plaintiff, but also an intent element which is separate and distinct from a finding of actual knowledge. See Christian Dior-New York, Inc. V. Koret, Inc., 792 F.2d 34, 40 (2d Cir.1986); Voest-Alpine International Corp. V. Chase Manhattan Bank, N.A., 707 F.2d 680 685 (2d Cir. 1983); Rosenthal v. National Life Insurance Co., 486 F.Supp. 1018, 1023 (S.D.N.Y. 1980). Thus, the jury's finding that the Estate had actual knowledge as of December 10, 1982, does not establish the intent element of either waiver or estoppel. Since there was no finding by the jury of the requisite intent to satisfy waiver or estoppel, Mr. Steinberg and Mr. Zolt have failed to carry their burden of establishing the elements of either of these affirmative defenses.

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[4] Mr. Zolt also argues that the jury's finding of "actual knowledge" on the part of the Estate on December 10, 1993, negates the conversion and breach of fiduciary duty claims. See "Affidavit of Ray Beckerman," filed Nov. 17, 1992, at 3. Mr. Zolt provides no reasoning for this argument, however, and the Court finds that it is without merit. Actual knowledge on the part of plaintiff does not exonerate the defendants on either the conversion or breach of fiduciary claims.

C. Ratification

[7][8] Defendants argue that plaintiff's claims are barred by the doctrine of ratification, because the Estate ratified defendants' unauthorized acts by not disaffirming the Coudert tax structure. We disagree. First of all, there is evidence that the Estate did not retain the Coudert tax structure. See "Plaintiff's Memorandum in Opposition to Defendants' Post-Trial Motions" ("Plaintiff's Memorandum"), Feb. 12, 1993, at 42-43 (and accompanying cites to Trial Transcript). More importantly, though, even had the Estate affirmed the tax structure by failing to repudiate it, such conduct would not constitute a ratification. Ratification does not occur where a principal must affirm a transaction to protect his own interests. Delano v. Kitch, 663 F.2d 990, 999 (10th Cir. 1981), cert. denied, 456 U.S. 946, 102 S.Ct. 2012, 72 L.Ed.2d 468 (1982). In this case, there is ample evidence that any action taken by the Estate with respect to the Netherlands and Netherlands Antilles after 1986 was necessary to protect its interests and avoid further loss. In any case, defendants have not contradicted plaintiff's argument that such an affirmation was necessary to protect the interests of the Estate. Accordingly, we do not believe that plaintiff's alleged failure to repudiate constitutes a ratification of Mr. Steinberg's and Mr. Zolt's unauthorized acts.

D. Constitutionality of RICO.

[9] Defendants maintain that they are entitled to judgment as a matter of law on plaintiff's RICO claims because the RICO Act, 18 U.S.C. s 1961 et seq., is unconstitutionally vague. In particular, defendants claim, the phrase "pattern of racketeering activity" has not been, nor can it be, defined with sufficient clarity to give a person of ordinary intelligence fair notice as to whether his or her conduct may give rise to RICO liability.

The Court disagrees, and relies on the clearly established

law in this Circuit establishing the constitutionality of the RICO Act. In particular, the Court relies on United States v. Coiro, 922 F.2d 1008 (2d Cir.), cert. denied, -- U.S. --, 111 S.Ct. 2826, 115 L.Ed.2d 996 (1991), in which the Court affirmed the conviction of an organized crime figure, holding that RICO's pattern requirement was not unconstitutionally vague as applied. 922 F.2d at 1017. In light of the facts of this particular case, the Court finds that the RICO statute provided the defendants with sufficient and fair notice that their illegal conduct was proscribed by RICO's provisions. Accordingly, we find that the RICO statute and its pattern requirement are not unconstitutionally vague as applied to defendants Mr. Steinberg and Mr. Zolt in this case.

E. Reliance on Inadmissible Evidence

1. Plaintiff J. Reid Bingham's Testimony:

[10] Defendants maintain that the plaintiff Mr. Bingham was erroneously permitted *1133 to testify in plaintiff's case-in-chief and in rebuttal on the grounds that plaintiff lacked first-hand knowledge of the case and that plaintiff was biased because of a conflict of interest.

The Court observes that defendants have not pointed to a single instance in the record in which Mr. Bingham testified to something which was not within his personal knowledge. Indeed, as the plaintiff's memorandum makes clear, the main areas addressed in Mr. Bingham's direct testimony were clearly subjects in which he was personally involved (i.e., his personal dealings with Mr. Steinberg and Mr. Zolt, his personal involvement in the tracing of diverted Estate assets and the preparation of the Deloitte & Touche report, and his personal involvement in the sale of recovered Estate assets, the proceeds of which were used to reduce the Estate's damage claim against defendants). See Plaintiff's Memorandum, at 30-31.

In addition, defendants argue that Mr. Bingham should

have been precluded from testifying based upon purported conflicts of interest. We disagree. The Court believes that any conflict of interest Mr. Bingham may have had would go to his credibility, but would not affect the admissibility of his testimony. Indeed, the nature and extent of Mr. Bingham's alleged conflicts of interest and bias were the subject of extensive and vigorous cross-examination. See United States v. Hill, 629 F.Supp. 493, 496 (D.Del. 1986)[5]. Accordingly, the Court finds that Mr. Bingham's testimony was admissible.

2. Testimony and Report of Deloitte & Touche:

[11] Defendants claim that the Court improperly admitted the Deloitt & Touche report and improperly allowed Thomas Hafner to testify about the report, because the testimony and the report did not meet the "threshold for relevancy, reliablity,or authority." "Reply Memorandum of Law of David J. Steinberg in Support of His Motion for Judgment as a Matter of Law, "Feb. 25, 1993, at 17. The Court disagrees. The Deloitt & Touch report was proffered by plaintiff as

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[5]The Court notes that Steinberg's citation to the ABA Code of Professional Responsibility, DR 5-102, which precludes an attorney from testifying as a witness in an action he is litigating, is inapposite, because Hughes Hubbard & Reed, and not Mr. Bingham or Kirkpatrick & Lockhart, represents the Estate in this action. Cf. International Electronics Corp. v. Flanzer, 527 F.2d 1288 (2d Cir. 1975) (disciplinary rule does not preclude law firm from appearing as trial counsel where former partner may be witness; "[w]e need not be concerned that . . . [the former partner] will unfairly vouch for his own credibility, for he will not be the advocate at trial. He will say no more than the trial judge permits him to say upon his oath." Id. At 1294-95).

evidence of the amount of money which was not remitted to the Estate between the years 1981 and 1986. This evidence was directly relevant to the issue of damages, and Mr. Hafner's expert testimony assisted "the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702. [6] Accordingly, we find that the Court did not err in admitting the Deloitt & Touche report and in allowing Mr. Hafner to testify.

3. Testimony Regarding Mr. Steinberg's Retention of Interest in Diverted Funds:

[12] Defendants maintain that the Court erred in admitting plaintiff's and Mr. Hafner's testimony that Mr. Steinberg retained an interest in diverted funds, because such evidence was irrelevant, or at most, only marginally relevant, and its probative value was substantially outweighed by the risk of prejudice. The Court disagrees. The testimony regarding Mr. Steinberg's retention of interest in diverted funds was relevant on the issue of intent, since it demonstrates that Mr. Steinberg was using, without authorization, funds diverted from the Estate for his personal use. Indeed, this evidence goes to the heart of Mr. Steinberg's defense that he acted at all times in good faith with respect to Estate matters. Under the circumstances, the Court finds that the probative value of the evidence significantly outweighs *1134 the danger of unfair prejudice, confusion of the issues, or misleading the jury. Fed.R.Evid. 403.

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[6] In addition, the Court finds no reason to question the reliability of the report or of Mr. Hafner's testimony. We observe that as senior manager at the accounting firm of Deloitte & Touche, Mr. Hafner had the qualifications that make for a reliable and authoritative expert witness.

4. Wayne Coleman's Testimony Regarding Valuation:

[13] Defendants claim that Wayne Coleman should not have been permitted to testify as a rebuttal witness on the subject of valuation because his testimony constituted an unfair surprise to the defendants. The Court disagrees. In the Pretrial Order, the Estate specifically listed Mr. Coleman as a possible expert rebuttal witness, whose testimony would be used to rebut elements of the defendants' case-in-chief relating to the value of the Estate's music assets. See Pretrial Order, Exhibit J, at 2 & 7. In addition, the Court is satisfied that the plaintiff produced Mr. Coleman's valuation report to defendants as soon as was practically possible.[7] Accordingly, the Court finds that Mr. Coleman's testimony regarding valuation was properly admitted by the Court.

F. Erroneous Jury Instructions

1. Instructions Precluding Consideration of Rita Marley's Intestate Share:

[14] Defendants maintain that the Court erred in instructing the jury that they could not consider Rita Marley's intestate share of Bob Marley's Estate in determining whether the Estate suffered an actual loss. The Court disagrees. The jury should not be permitted to consider Rita Marley's entitlement in assessing damages since defendants have failed to proffer sufficient evidence to "provide the jury with a sound basis for approximating with reasonable certainty" the amount of Rita

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[7]According to the plaintiff, the report was completed only eight hours before copies were given to defendants. See Plaintiff's Memorandum, at 37.

Marley's entitlement. S & K Sales Co. V. Nike, Inc., 816 F.2d 843, 852 (2nd Cir. 1987). Thus, any determination by the jury as to such amount would be speculative and, as such, cannot constitute a proper basis for an offset. See Wolff & Munier, Inc. v. Whiting-Turner Contracting Co., 946 F.2d 1003, 1012 (2nd Cir. 1991). Accordingly, we find that the Court did not err in precluding consideration of Rita Marley's intestate share. See Trial Tr. 8561-65.

2. Instruction Precluding Consideration of Beneficiaries' Position:

[15] Defendants claim that the Court erred in instructing the jury that only actual loss to the Estate was at issue, and that the individual beneficiaries' position were irrelevant. We disagree. An estate is an entity apart and distinct from its beneficiaries. The respective positions of the estate's beneficiaries does not affect the measurement of damages incurred by the plaintiff's damages was the loss to the Estate and not the loss to the individual beneficiaries. See Trial Tr. 8561.

3. Instruction Precluding Consideration of Rise in Value of "Diverted Corporations":

[16] Defendants claim that the Court erred in instructing the jury not to consider the increase in value of the "diverted corporations" unless defendants were only found liable for negligence. We disagree. First of all, defendants are not entitled to an offset for enhancement because defendants were found liable as intentional tort feasors and faithless fiduciaries. Defendants should not be able to reap the benefit of any enhancement in the value of the assets during the period of wrongdoing. See Randall v. Loftsgarden, 478 U.S. 647, 662-

62, 106 S.Ct. 3243, 3152-53, 92 L.Ed.2d 525 (1986); Estate of Rothko, 84 Misc.2d 830, 379, N.Y.S.2d 923, 965 (1975), aff'd, 43 N.Y.2d 305, 501 N.Y.S.2d 449, 372 N.E.2d 291 (1977). See also Janigan v. Taylor, 344 F.2d 781 (1st Cir), cert. denied, 382 U.S. 879, 86 S.Ct. 163, 15L.Ed.2d 120 (1965) ("It is more appropriate to give the defrauded party the benefit even of windfalls than to let the fraudulent party keep them." Id. at 786).

[17][18] Secondly, defendants are entitled to a "credit" for any enhancement of the value of the recovered music assets only if the jury determines that the enhancement was result of defendant's efforts and expenditures. See American East India Corp. v. *1135 Ideal Shoe Co., 400 F.Supp. 141, 168 (E.D.Pa. 1975), aff'd 568 F.2d 768 (2d Cir. 1978); Segar v. State, 111 Misc.2d 1034, 445 N.Y.S. 2d 894, 897 (1981). Because defendants have failed to proffer sufficient evidence on what portion of the increase in the value of the music assets was attributable to the efforts and expednditures of the defendants, we believe the jury was correctly instructed not to consider the increase in value of the diverted corporations.

4. Instruction Allowing Estate to Claim Royalties Owing to "Diverted Corporations" as Damages:

[19] Defendants maintain that the Court erred in permitting the Estate to claim as damages royalties that were owed to the diverted corporations. We disagree. In this argument, defendants urge a formalistic distinction between the Estate, as the owner of the corporations, and the corporations themselves, arguing that only the latter may sue for the diversion of royalty income. In cases where an estate owns the corporation, however, courts, including the corporation from its owner for the benefit of the estate. See Musico v. Champion Credit

Corp., 764 F.2d 102, 108-110 (2d Cir. 1985). We believe that the owner, the Estate, is necessary to prevent fraud and achieve equity. Id. At 108. Accordingly, we find that the Court did not err in permitting the Estate to claim as damages royalties that were owed to the diverted corporations.

G. No Evidence of Actual Loss

Defendants claim that they are entitled to judgment as a matter of law because damages are an essential aspect of all plaintiff's purported causes of action and because plaintiff failed to present any evidence that the Estate suffered an actual loss in the case. We disagree. The Court believes that the plaintiff presented substantial evidence of actual loss, in particular with respect to the assets that were diverted from the Estate by the defendants.

H. The Award of Punitive Damages to Plaintiff is Erroneous

Defendants Mr. Steinberg argues that the award of $1,000,000 in punitive damages is erroneous to the extent it is based on RICO claims since RICO's treble damages provision is itself punitive in nature. Although it appears to be an open question in the Second Circuit as to whether RICO's treble damages provision is in fact punitive in nature, this Court has held that RICO's treble damages provisions precludes recovery of punitive damages. See Galerie Furstenberg v. Coffaro, 697 F. Supp. 1282 (S.D.N.Y. 1988) ("Since ... [plaintiff] sues here under the federal RICO laws, whose plain language do not allow for punitive damages, and has not shown that Congress intended such damages to be available under Rico, [the claim for punitive damages is dismissed] Id. at 1289).

[20][21][22] In this case, plaintiff received $800,000 on its RICO claims, which was trebled by the Court $2, 400,000. Given this substantial increase, we do not believe that a punitive damage award would be appropriate if it is based on the RICO violations. It is generally sound practice not to ask a jury to

consider awarding separate punitive damage awards in cases involving multiple claims, since such a practice can artificially inflate the aggregate amount awarded. See King v. Macri, 993 F.2d 294, 298-99 (2d Cir. 1993). Accordingly, it is impossible to discern which claims the jury based its award of punitive damages. See Special Verdict Sheet, questions 61-62. Under the circumstances, the Court believes that a reduction in the punitive damages award is in the interests of reasonableness and fairness to the litigants. Specifically, we find that an award of $250,000 is sufficient to deter similar conduct by the defendant in the future and to serve as a warning to others not to engage in such wrongful non-RICO acts. In addition, we find that such a figure bears a reasonable relationship to the harm done and the flagrancy of the conduct causing it. Accordingly, we order that the judgment be revised to reflect a punitive damage award of $250,000 against defendant Mr. Steinberg, as opposed to the previous figure of $1,000,000. See Aldrich v. Thomson McKinnon Securities, *136 Inc., 756 F.2d 243 (2d Cir. 1985) ("It is the duty of a court ... 'to keep a verdict for punitive damages within reasonable bounds' ... " Id. at 248-49 (citations omitted).[8]

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[8] Defendant Steinberg argues that the award of punitive damages violates the Eighth and Fourteenth Amendments to the United States Constitution. The defendant fails to cite any cases for this novel proposition, and the Court finds that it is without merit. The defendant also argues that punitive damages are not available in this case because "the only alleged 'damages' plaintiff sustained occurred after plaintiff failed to conduct a reasonably diligent inquiry." "Motion of Defendant David J. Steinberg for Judgment as a Matter of Law," January 19, 1993, at 15. Again, the defendant fails to provide a case for

1. The Jury's Verdict was Tainted by Unfair Prejudice

[23] Defendant Mr. Steinberg maintains that he was unfairly prejudiced by the Court's requiring to invoke the Fifth Amendment in the jury's presence. We disagree. The Supreme Court has stated that the Fifth Amendment does protect a witness against the "imposition of any sanction which makes assertion of the Fifth Amendment privilege 'costly." Spevack v. Klein, 385 U.S 511, 515, 87 S. Ct 625, 628, 17 L.Ed2d 574 (1967) (citations omitted). However, we do not believe that Mr. Steinberg's invocation of the Fifth Amendment was "costly" in a constitutional sense. We have reached this conclusion in light of the facts that the jury was properly instructed on the issue of Mr. Steinberg's invocation of the Fifth Amendment (See Jury Charge, Instruction No. 25 at 17), and that the plaintiff presented substantial evidence against Mr. Steinberg apart from any proper adverse inferences consequent to his invocation of the Fifth Amendment. See Baxter v. Palmigiano, 425 U.S. 308, 318, 96 S. Ct. 1551, 1558, 47 L.Ed. 2d 810 (1976).

In addition, the Court finds that Mr. Steinberg's testimony was admissible under Rule 403 of the Federal Rules of Evidence in that its probative value substantially outweighed the risk of unfair prejudice. The Court believes that Mr. Steinberg's invocation of the Fifth Amendment was highly probative on the issue of liability (see Brink's, Inc. v. City of New York, 539 F.Supp 1139 (S.D.N.Y. 1982) (invocation of

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his proposition, and the Court finds that the fact that the Estate had actual knowledge and did not conduct a reasonably diligent inquiry does not prevent the imposition of a punitive damages award, which, in this case, was imposed by a jury properly instructed as to the standard for awarding punitive damages.

Fifth Amendment has "significant probative value" on issue of liability), aff'd, 717 F.2d 700 (2d Cir. 1983)), and that any prejudice Mr. Steinberg suffered as a result of the invocation was not "unfair" (See Id. At 710).

J. Motion for an Order Staying the Proceedings

As the Court has hereby disposed of all the issues raised in the defendants' motions, defendants' motion to stay proceedings pending the disposition of the motion for judgment as a matter of law is moot.

K. Plaintiff's Motion to Register Judgment Outside of New York

[24] Plaintiff has requested that this Court order that the Judgment in this case be registered in the district of Pennsylvania, on the ground that "[since] Steinberg is a Pennsylvania resident, presumably most if not all of his assets lie outside of this district." Plaintiff's Memorandum, at 54. Plaintiff correctly observes that registration of a judgment in another district may be allowed for "good cause" (28 U.S.C. s 1963 (West Supp. 1992)), and that good cause may be shown where the defendant has substantial property in another district and insufficient property in the rendering district to satisfy the judgment. However, the plaintiff has not provided a case, nor have we found one, that stands for the proposition that an automatic presumption of "good cause" is established by the fact that a defendant has a different residence than that of the rendering district. Accordingly, at this time, we deny plaintiff's request for an order to register this Judgment in Pennsylvania, but will allow plaintiff to refile this motion upon a more convincing showing of good cause.

L. Plaintiff's Application for Attorney's Fees and Disbursements

[25] In the Judgment entered by this Court on January 4, 1993, the Estate was awarded reasonable attorney's fees against *1137 defendants Mr. Zolt and Mr. Steinberg pursuant to 18 U.S.C. s 1964 (c). In accordance with the Judgment, the plaintiff has submitted an accounting with respect to attorneys' fees and disbursements, requesting $3,300,000 in legal fees and $264,033.48 in disbursements, for a total of $3,564,033.48. See "Plaintiff's Revised Accounting with Respect to Attorneys' Fees and Expenses, Submitted Pursuant to the Judgment Entered Herein, and Revised Affidavit in Support Thereof" ("Plaintiff's Accounting"), Feb. 5, 1993.

The Court has carefully reviewed the Plaintiff's Accounting and the defendants' opposition affidavits. See Jeremy Mishkin's "Affidavit in Opposition to Plaintiff's Revised Accounting with Respect to Attorney's Fees and Expenses" ("Affidavit in Opposition"), Feb 18, 1993; Ray Beckerman's "Affidavit Concerning Plaintiff's 'Accounting' of Attorneys' Fees," Feb. 3, 1993. We are somewhat troubled by the high level of expenses incurred by the plaintiff, in particular with respect to certain aspects of the Plaintiff's Accounting. The Court does not challenge the veracity of the figures, but does question the reasonableness of certain expenses (e.g., billing $24,108.75 in legal fees in a single day (See Plaintiff's Accounting, at 491, entries for October 29, 1992); 23 hours charged by a single attorney on a single day (See Plaintiff's Accounting, at 463, entry for S.D. Rothman on September 24, 1992)).

[26][27][28][29][30] Under the circumstances, the Court will reduce the plaintiff's requested total by fifteen percent. Accordingly, the Court awards the plaintiff attorneys'

fees and disbursements in the sum of $3,029,428.46.[9]

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[9]In Mr. Mishkin's Affidavit in Opposition, he argues that the fees which were incurred subsequent to the commencement of the contingent fee arrangement between the Estate and its attorneys are not actual expenses of the Estate for purposes of computing the award of attorneys' fees against Mr. Steinberg and Mr. Zolt. We disagree. The establishment of a contingent fee does not alter the computation of attorneys' fee in a manner that would eliminate the expenses for hourly billing. See City of Burlington v. Dague, ----U.S.----, 112. S.Ct. 2638, 2639-41, 120 L.Ed. 2d 449 (1992); Williamsburg Fair Housing Committee v. Ross-Rodney Housing Corp., 599 F. Supp. 509, 519 (S.D.N.Y. 1984).

> In addition, the Court declines to reduce the award of attorneys' fees to reflect the fact that $250,000 of the damages was for non-RICO claims. While the non-RICO claims by themselves do not merit an award of attorneys' fees, the Court believes that all of the plaintiff's claims involved a common nucleus of facts and were based on related legal theories. Under the circumstances, we believe that any reduction in the award of attorneys' fee due to the non-RICO claims would be inappropriate. See Hensley v. Eckerhart, 461 U.X. 424, 435, 103 S. Ct. 1933, 1940, 76 L.Ed 2d. 40 (1982). The Court rejects defendants' request for a jury trial, discovery and an evidentiary hearing on the issue of attorneys' fees. Courts have the responsibility of calculating an award of attorneys' fees which is made pursuant to a

statute. See Gagne v. Town of Enfield, 734 F.2d 902, 904 (2d Cir 1984; United States Football League v. National Football League, 704 F. Supp. 474, 476 (S.D.N.Y.), aff'd 887 F. Ed 408 (2d Cir 1989), cert. Denied, 493, 493 U.S. 1071, 110 S. Ct. 1116, 107 L.Ed.2d 1022 (1990). In this case, the Estate has been awarded attorneys' fees pursuant to 18 U.S.C. s 1964 (c). Accordingly, the Court, and not a jury, determines the amount of the award.

In making this determination, the Court is satisfied that the plaintiff's documentation and detailed description with respect to legal fees and costs, as set forth in Plaintiff's Accounting, provide the Court with an adequate record upon which to base the award. Accordingly, the Court will not allow the defendants to engage in any discovery or to conduct an evidentiary hearing on the issue of attorneys' fees. The defendants have failed to demonstrate why this already protracted litigation should be further extended to permit additional inquiries concerning attorneys' fees.

J. Reid BINGHAM, as Ancillary Administrator of the Estate of Robert Nesta Marley,

Plaintiff,

v.

Marvin ZOLT; Zolt & Loomis. P.C.; David J. Steinberg; Bluestein, Rutstein & Mirarchi, P.C.; Greenstein Gorelick, Price, Silverman & Laveson; Martin Oliner; Martin Oliner, P.C.; and Coudert Brothers,

Defendants.

COUDERT BROTHERS, Martin Oliner. P.C.; Martin Oliner, P.C.; and Bluestein, Rutstein & Mirarchi, P.C.,

Third-Party Plaintiffs,

v.

Rita MARLEY and Mutual Security Merchant Bank and Trust Company,

Third Party Defendants.

No. 86 Civ. 9477 (KC)

United States District Court, S.D. New York

May 26, 1993.

OPINION AND ORDER

CONBOY, District Judge:

1. This case was tried over a period of twelve weeks before a jury, which returned a verdict in favor of the plaintiff and against two of the defendants, Marvin Zolt and David Steinberg. Currently before the Court are several post-trial motions from different parties to the litigation. This Order addresses the motions of J. Reid Bingham, Martin Oliner, Martin Oliner, P.C., Coudert Brothers (Coudert), Bluestein,

Rutstein & Mirarchi, P.C. ("Bluestein"), and Rita Marley.

A. Motion of J. Reid Bingham:

The plaintiff J. Reid Bingham has moved to alter or amend the judgment to adjudge Zolt & Loomis, P.C. ("Zolt & Loomis") liable to plaintiff. [10] Plaintiff argues that Zolt & Loomis is liable to the Estate as a matter of law for the actions of Marvin Zolt since both Marvin Zolt and Zolt & Loomis stipulated in the Pretrial Order, entered by this Court, the following undisputed facts: "Zolt & Loomis, P.C. is a professional corporation of certified public accountants organized and existing under the laws of the State of New York..." (Pretrial Order, Para. 25); "Marvin Zolt is an officer and principal of Zolt & Loomis, P.C." (Id. At 23); "Zolt began working for Bob Marley in the late 1960's and continued to represent the Estate outside of Jamaica until his services were terminated by the Estate in December 1986." (Id. At para 22); "At all times Zolt was acting on behalf of Zolt & Loomis, P.C." (Id. At 24 & Ex. N).

Under New York law, a professional service corporation, as any other corporation, is liable for the actions of its principals and officers when acting in such capacities. See Connell v. Hayden, 443 N.Y.S 2d 383, 395 (1980). Accordingly, Zolt & Loomis would be liable for the action of Marvin Zolt if Zolt was acting in his capacity as an officer and principal of Zolt & Loomis when he committed the acts for which he was found liable in this case.

The Court believes that the undisputed facts, as stipulated in the Pretrial Order and as cited above, make clear

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[10]The plaintiff has also moved, in accordance with the Court's judgment, for attorney's fees and expenses. The Court will address these calculations in a subsequent order.

that Zolt was acting in his capacity as an officer and principal of Zolt & Loomis when he committed the acts for which he was found liable in this case.[11] Accordingly, the Court grants the plaintiff's motion to alter or amend the judgment to adjudge Zolt & Loomis liable to plaintiff.

B. Motions of Martin Oliner, Martin Oliner, P.C., Coudert, and Bluestein and Rita Marley:

Defendants Martin Oliner, Martin Oliner, P.C., Coudert, and Bluestein (the "defendants") have all moved to alter or amend the judgment. Specifically, defendants have moved for (1) imposition of costs against plaintiff; (2) dismissal of third party claims as moot rather than on the merits; and (3) an express determination that the costs of third-party defendants Rita Marley and Mutual Security are not to be imposed against defendants.

The award or denial of costs is squarely within the discretion of the trial court. See Mid-Hudson Legal Service, Inc. v. G&U, Inc., 578 F.2d 34, 38 n. 3 (2d Cir. 1978). We believe that the Estate acted in good faith in prosecuting this action, which involved complicated and close issues of material fact. Accordingly, the Court denies defendants' motions for the imposition of their costs against plaintiff.

*2 The Court also denies defendants' motions to dismiss the claims against third-party defendants Rita Marley and the Mutual Security Merchant Bank and Trust Company ("Mutual Security") as moot rather than on the merits. The defendants maintain that because the jury found no common law liability against Oliner, Oliner P.C., Coudert or Bluestein, the questions

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[11] In particular, the Court focuses on the undisputed fact that "[a]t all times Zolt was acting on behalf of Zolt & Loomis, P.C." (Pretrial Order, at 24 & Ex. N)

with respect to the liability of the third-party defendants became moot.

The Court disagrees. Although it appears that the jury may have failed to strictly adhere to the Court's instructions, we are satisfied that on the basis of the full record, the jury properly resolved the mater on the merits with respect to Rita Marley and Mutual Security. Furthermore, by concluding otherwise, we would inflict upon the third-party defendants, largely as a consequence of a technicality, the possible prospect of protracted, expensive, and unnecessary further proceedings. Rita Marley, in particular, was on the stand for eleven days and was exhaustively examined and cross-examined. Indeed, it is entirely plain from the record that she was the central figure in the trial and her role in the controversy became the principal subject of contention in a litigation which dragged on at immense expense for seven years. Accordingly, we deny defendants' motions to dismiss the claims against Rita Marley and Mutual Security as moot rather than on the merits.

Rita Marley has moved the Court to alter or amend the judgment to provide for the imposition of costs against either the plaintiff or the third-party plaintiffs. The Court has already found that the plaintiff acted in good faith in prosecuting this action. We also find that the third-party defendants acted in good faith in bringing the third-party action against both Rita Marley and Mutual Security, and that the third-party action involved complicated and close issues of material fact. Accordingly, the Court denies Rita Marley's motion to alter or amend the judgment, and, pursuant to the request of the third-party plaintiffs, we expressly determine that the costs of third party defendants Rita Marley and Mutual Security are not to be imposed against defendants Martin Oliner, Martin Oliner, P.C. Coudert, or Bluestein.

SO ORDERED.

Citation | Database | Mode
810 F. Supp 100 Found Document | DCT | Page
RICO Bus. Disp. Guide 8187
(Cite as: 810 F. Supp 100)

J. Reid BINGHAM
v.
Marvin ZOLT, et. Al.
No. 86 Civ 9477 (KC).
United States District Court,
S.D. New York
Jan. 4, 1993

Prevailing plaintiff estate requested prejudgment interest on its Racketeer Influenced and Corrupt Organizations Act (RICO) recovery. The District Court, Conboy J., held that treble damage award on RICO recovery adequately compensated estate for actual damages and obviated need for prejudgment interest.
So Ordered.

[1] Interest k39 (2.20)
219k39 (2.20)
In face of silence of Racketeer Influenced and Corrupt Organizations Act (RICO) on subject of prejudgment interest, court has discretion to award or not award prejudgment interest. 18 U.S.C.A. s 1961 et seq.

[2] Interest k39 (2.20)
219k39 (2.20)
Award of treble damages adequately compensated prevailing plaintiff estate in civil Racketeer Influenced and Corrupt Organizations Act (RICO) action for actual damages suffered,

so that estate was not entitled to prejudgment interest on its RICO recovery; there was evidence that value of diverted estate assets was actually enhanced during period of wrongdoing, estate did not allege that defendants charged excessive or unduly high fees for their services, and estate had been awarded $1 million in punitive damages against on of defendants. 18 U.S.C.A. s 1964 (c)

[3] Interest k39 (2.6)
219k39 (2.6)
Formerly 219k39 (2.5)
Main function of prejudgment interest is to fully compensate plaintiff for damages suffered.

[4] Interest k39 (2.20)
219k39 (2.20)
Where court trebles damages pursuant to Racketeer Influenced and Corrupt Organizations Act (RICO), awarding prejudgment interest probably will be unnecessary as treble damages usually will be more than adequate compensation for actual damages suffered; however, exceptional circumstances may exist, where treble damages do not adequately compensate plaintiff for actual damage or where defendant unreasonably and unfairly has sought to delay or obstruct course of litigation, warranting imposition of prejudgment interest on RICO judgment 18 U.S.C.A. s 1964 (c).
*101Robert Brundige, Jr., Hughs Hubbard & Reed, New York City, for plaintiff.

Paul D. Friedlan, Coudert Bros.; Kaare Phillips, Grais & Phillips; Adam Simms, Brody & Fabiani; Kathryn Keneally, Kostelanetz Ritholz Tigue & Fink, Ray Beckerman, New York City; and Jeremy Miskin, Montgomery McCracken Walker & Rhoads, Philadelphia, PA, for defendants.

OPINION AND ORDER

CONBOY, District Judge:

Following twelve weeks of trial, a jury returned a verdict in favor of the plaintiff estate again two of the defendants, Marvin Zolt and David Steinberg, in the sum of $800,000 on the three RICO counts and $250,000 on the common law counts. In accordance with 18 U.S.C. s 1964 (c), the Court has trebled the RICO recovery and awarded reasonable attorney's fees to the plaintiff.

[1] The issue before the Court is whether to grant plaintiff's request for prejudgment interest on the RICO recovery. The RICO statute is silent on the subject of prejudgment interest. Nu-Life Const. v. Board of Education, 789 F. Supp. 103, 104 (E.D.N.Y. 1992). In the face of this silence, the Court has discretion to award or not award prejudgment interest. Wickham Contracting Co. v. Local Union No. 3, 955 F.2d 831, 835 (2dCir 1992).

[2] In Wickham Contracting v. Local Union No. 3, 955 F.2d 831 (2d Cir 1992), the Second Circuit analyzed the general factors to consider in deciding whether or not to award prejudgment interest. In that case, the Court wrote:

> ...the award should be a function of (I) the need to fully compensate the wronged party for actual damages suffered, (ii) considerations of fairness and the relative equities of the award, (iii) the remedial purpose of the statute involved, and/or (iv) such other general principles as are deemed relevant by the court.

Id. At 833. Applying the Wickham factors to the present case,

we find that the treble *102 damage award on the RICO recovery adequately compensates plaintiff for the actual damages suffered and obviates the need to award prejudgement interest. Indeed, there was evidence introduced by the defendants that the value of the diverted estate assets was actually enhanced during the period of the wrongdoing. In addition, the Court notes that the plaintiff has not even alleged, no less proven, that the defendants charged excessive or unduly high fees for their services. Finally, the jury has already returned a verdict against one of the defendants, David Steinberg, for punitive damages in the amount of $1,000,000.

While denying an award of prejudgment interest based on the particular circumstances of this case, the Court observes that the Second Circuit has yet to decide whether prejudgment interest is ever available on a RICO verdict. At least one Court in this Circuit has suggested that prejudgment interest should not be available on a RICO verdict. In Nu-Life Const. V. Board of Education, 789 F.Supp 103 (E.D.N.Y 1992), the Court denied plaintiff prejudgment interest, stating "it appears that interest awards under RICO are unnecessary to fairly compensate a successful plaintiff." Id. at 105. The Nu-Life Court based its reasoning on the holding in Trans World Airlines, Inc v. Hughes, 449 F.2d 51, 80 (2d Cir 1971), in which the Court found that the treble damages provided under the Clayton Act sufficiently compensated the plaintiff and made an award of prejudgment interest unnecessary. In Trans World Airlines, Inc., the Court asserted that "[i]t is reasonable to interpret Congress's silence on the matter as indicating that trebled damages are sufficient penalty and that interest need not

be included." Id. At 80.[1]

[3][4] The main function of an award of prejudgment in interest is to fully compensate a plaintiff for damages suffered. See Rolf v. Blyth, Eastman Dillon & Co., Inc., 637 F.2d 77 (2d Cir 1980) ("An award of prejudgment interest is in the first instance, compensatory..."). Where, as in this case, the Court trebles the damages pursuant to the RICO statute (18 U.S.C. s 1964 (c)), awarding prejudgment interest will probably be unnecessary; treble damages will usually more than adequately compensate a plaintiff for actual damages suffered.

However, the Court recognizes the possibility that

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[1]The Court has found two other District Court decisions that have suggested that prejudgment interest should never be available on a RICO verdict. See Brunswick Corp v. E.S. Doyle Mfg.Co., 770 F.Supp. 1351 (E.D. Wis. 1991) ("The defendants note that RICO does not provide for prejudgment interest on top of multiple damages since multiple damages are sufficient to compensate the plaintiff for any loss arising from the unavailability of their funds." Id. At 1373); Louisiana Power & Light v. United Gas Pipe Line, 642 F. Supp 781 (E.D. La. 1986) ("The RICO statute does not provide for the recovery of prejudgment interest, and federal courts have generally refused to award prejudgment interest on claims which provide for multiple damages. They have done so for the sound reason that multiple damages more than reimburse a plaintiff for any loss he suffers from an unavailability of the funds he seeks to recover. I see no reason why a RICO claim should be treated any differently, and I refuse to allow the plaintiff any prejudgment interest on its RICO claim." Id. At 811) (Citations omitted.)

The Court agrees with the result of these two decisions but, for the reasoning set forth in the text of this opinion, declines to follow a rigid rule prohibiting prejudgment interest on a RICO verdict.

exceptional circumstances may exist--specifically, where treble damages do not adequately compensate a plaintiff for the actual damages suffered, or where a defendant has sought unreasonably and unfairly to delay or obstruct the course of litigation--warranting the imposition of prejudgment interest on a RICO judgment. See General Facilities v. Nat Marine Service, 664 F. 2d 672 (8th Cir. 1981) ("Prejudgment interest serves at least two purposes: (1) it helps compensate plaintiffs for the true cost of money damages they have incurred, and (2) where liability and the amount of damages are fairly certain, it promotes settlement and deters an attempt to benefit unfairly from the inherent delays of litigation: Id. At 674). Such exceptional circumstances are not present in this case, and the Court accordingly declines to *103 grant plaintiff's request for prejudgment interest.[2]

Plaintiff cites Tri Component Products Corp. v. Benarroch, RICO Bus. Disp. Guide s 7017, 1988 WL 126560 (S.D.N.Y. 1988), in which the Court awarded prejudgment interest on a RICO recovery, to support its claim for prejudgment interest. The Court in Tri Component Products Corp. did not provide reasoning for awarding prejudgment interest on top of the treble damages award. Nevertheless, this case is distinguishable from Tri Component Products Corp. In Tri Component Products Corp., in contrast to this case, the

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[2]The Court also observes that no prejudgment interest is available when the statute in question is punitive in nature, and that it appears to be an open question in the Second Circuit as to whether RICO's treble damage provision is in fact punitive in nature. See Nu-Life Const. v. Board of Education, 789 F.Supp. 103, 1044(E.D.N.Y. 1992). See also Wickham Contracting Co. v. Local Union No. 3, 955 f.2d 831, 834 (2d Cir. 1992) ("prejudgment interest should not be awarded if the statutory obligation on which interest is sought is punitive in nature.").

Court entered judgment on default against the defendant and accepted verbatim the Magistrate's Recommended Order, to which the defendants filed no objections. In addition, as we have noted in this case, plaintiff has already been awarded $1,000,000 in punitive damages.[3]

Incredible, plaintiff also cites Bankers Trust v. Rhodes, 859 F.2d 1096 (2d Cir 1988), cert denied 490 U.S. 1007, 109 S. Ct. 1642, 104 L.Ed 2d 158 (1989), for the proposition that an award of prejudgment interest is appropriate on a RICO recovery. Despite the fact that the Bankers Trust decision neither involved nor mentioned prejudgment interest, plaintiff writes that "...the Second Circuit had previously held in Banker's Trust that prejudgement interest is consistent with the Congressional intent underlying the RICO statute..." Plaintiff's Letter, dated Dec. 22, 1992, p.3 Plaintiff seems to draw the conclusion that prejudgment interest is a logical extension of the general language in the Court's decision about the need to fully compensate a victorious RICO plaintiff. This Court disagrees

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[3]Furthermore, the Court notes that Tri Component Products Corp. appears to be the only case in this District in which a Court has awarded prejudgement interest on a RICO claim. See Nu-Life Const. v. Board of Education, 789 F.Supp. 103-105 (E.D.N.Y. 1992) ("... no other Court in this Circuit has taken this expansive view of the applicability of prejudgment interest with regard to an award of treble damages in a RICO case."). The Court has also found a Seventh Circuit case in which prejudgment interest was awarded on a RICO judgment. In AETNA Casualty & Surety Company of Illinois v. Levy, 1985 WL 3766 (ND Ill 1985), the Court Awarded prejudgment interest on a RICO judgment, but, as in Tri Component Products Corp, failed to provide its reasoning.

with and declines to accept plaintiff's strained and dubious reading of the Bankers Trust decision

CONCLUSION

In sum, the Court denies plaintiff's request for prejudgment interest on its RICO recovery. The Court recognizes that extraordinary circumstances may exist warranting prejudgment interest on a RICO verdict, but finds that those circumstances are not present in this case.

APPENDIX C
(Court of Appeals Judgment)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 28th day of September, one thousand nine hundred and ninety-five.

PRESENT: HON. JON O. NEWMAN,
Chief Judge,
HON. JAMES L. OAKES
HON. RICHARD J. CARDAMONE,
Circuit Judges.

Docket no. (s): 93-7695, 93-7709

J. REID BINGHAM, as Ancillary Administrator of the ESTATE OF ROBERT NESTA MARLEY,

Plaintiff-Appellee,

v.

MARVIN ZOLT; ZOLT & LOOMIS, P.C., and DAVID J. STEINBERG

Defendants-Appellants,

GREENSTEIN, GORELICK, PRICE, SILVERMAN

& LAVESON,

Defendant,

BLUESTEIN, RUTSTEIN & MIRARCHI, P.C.; MARTIN OLINER; MARTIN OLINER, P.C. and COUDERT BROTHERS,

Defendants-Third-Party-Plaintiffs,

RITA MARLEY and MUTUAL SECURITY MERCHANT BANK AND TRUST COMPANY

Third-Party-Defendants

Appeals from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ORDERED, ADJUDGED and DECREED that the judgement of said district court be and it hereby is affirmed in accordance with the opinion of this Court, with costs to be taxed against the appellants.

APPENDIX D
(Court of Appeals Denial of Rehearing)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATE COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in thousand nine hundred and ninety-five.

J. Reid Bingham, as Ancillary
Administrator of the Estate of
Robert Nesta Marley,
Plaintiff-Appellee,

v.

Marvin Zolt; Zolt & Loomis, P.C.,
and David J. Steinberg,
Defendants-Appellants,

Greenstein, Gorelick, Price,
Silverman & Laveson,
Defendant,

Bluestein, Rutstein & Mirarchi, P.C.;
Martin Oliner; Martin Oliner, P.C. and
Coudert Brothers,
Defendants-Third-Party Plaintiffs,

Rita Marley and Mutual Security Merchant
Bank and Trust Company,
Third-Party Defendants.

A petition of rehearing containing a suggestion that the action be reheard in banc having been filed herein by the appellant Marvin Zolt etal.

> Upon consideration by the panel that decided the appeals, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III, Clerk

By: _____
Beth J. Meador,
Administrator Attorney

Supreme Court, U.S.
FILED
MAR 6 1996
CLERK

Nos. 95-1245
95-1276

In The

Supreme Court of the United States

October Term, 1995

DAVID J. STEINBERG,
MARVIN ZOLT, AND ZOLT & LOOMIS, P.C.,
Petitioners,

v.

J. REID BINGHAM, as Ancillary Administrator of the
ESTATE OF ROBERT NESTA MARLEY,
Respondent.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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35 pp

QUESTIONS PRESENTED

1. Did the Second Circuit err when it held Respondent's RICO claim timely as to injuries suffered within four years before suit?

2. Are RICO's "pattern" and "enterprise" requirements unconstitutionally vague as applied to defendants found guilty of multiple schemes involving innumerable acts of wire fraud, mail fraud, and interstate transport of stolen property over a five year period?

3. Did the district court abuse its discretion or commit any procedural error worthy of review?

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In The

Supreme Court of the United States

October Term, 1995

DAVID J. STEINBERG,
MARVIN ZOLT, AND ZOLT & LOOMIS, P.C.,

Petitioners,

v.

J. REID BINGHAM, as Ancillary Administrator of the
ESTATE OF ROBERT NESTA MARLEY,

Respondent.

ON PETITIONS FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

Respondent J. Reid Bingham, as Ancillary Administrator of the Estate of Robert Nesta Marley, submits this brief in opposition to the Petition for a Writ of Certiorari submitted by David J. Steinberg (the "Steinberg Pet.") and the Petition for a Writ of Certiorari submitted by Marvin Zolt and Zolt & Loomis, P.C. (the "Zolt Pet.").

STATEMENT OF THE CASE

Respondent respectfully refers the Court to the factual narrative contained in the Second Circuit's opinion, *Bingham v. Zolt*, 66 F.3d 553 (2d Cir. 1995), *petitions for cert. filed*, 64 U.S.L.W. 3561 (U.S. Feb. 5, 1996) (No. 95-1245), 64 U.S.L.W. 3561 (U.S. Feb. 9, 1996) (No. 95-1276) (Steinberg Pet. at 1a to 28a; Zolt Pet. App. A), for a complete statement of the applicable facts. The following are some key facts bearing upon the appropriateness of review.

Petitioners, a lawyer, an accountant, and the accountant's accounting firm, were adjudged guilty of conducting a complex and varied series of fraudulent schemes. Using their positions as fiduciaries, they successfully conspired to remove valuable assets and divert millions of dollars from the estate of the late reggae musician Robert Nesta (Bob) Marley (the "Marley Estate") over a five year period. The jury found Petitioners liable for multiple violations of RICO, fraud, and breach of fiduciary duty.[1]

The details of the Petitioners' principal schemes are set out in the Second Circuit's opinion. *Bingham*, 66 F.3d at 557-58 (Steinberg Pet. at 4a-6a). Through their schemes, Petitioners, *inter alia*, employed forged back-dated share transfers and assignments to take companies and assets out of the Marley Estate and diverted periodic royalty and other payments owed to the Marley Estate over a five year period,

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1. Petitioner Zolt's suggestion (Zolt Pet. at 4 n.1) that Steinberg and he were not adjudged liable for diverting Estate assets to themselves is incorrect. The record demonstrated that Petitioners helped themselves to well in excess of $ 1 million in unauthorized "fees" incurred in implementing their various fraudulent schemes, as compared to the ten to fifteen thousand dollars a year they received from Bob Marley prior to his death.

from 1981 to 1986, until shortly before Respondent filed suit in December, 1986. Through these schemes, Petitioners received royalty payments and other income on a continual basis over this period and, instead of turning these monies over to the Estate, funnelled and transported them from Philadelphia to New York City through and between their own bank accounts, those of various corporate entities, and one set up in the name of Bob Marley's wife.

Petitioners misstate the record in at least two critical respects. First, in the special verdict sheet, the jury was asked whether the Marley Estate had actual knowledge of Petitioners' wrongful acts by December 10, 1982. The jury answered this question in the affirmative. But contrary to Petitioners' arguments (*e.g.* Zolt Pet. at 9), the jury did not find -- and indeed could not have found -- that the Marley Estate had knowledge of <u>all</u> of Petitioners' wrongful acts before that date. (*See* Zolt Pet. at 6 (quoting verdict sheet).)

Although the mechanics of some of Petitioners' schemes may have been completed prior to December 1982, the constant diversions of royalties and other funds owed to the Marley Estate continued for a long time thereafter, each diversion constituting a separate and new instance of mail fraud, wire fraud, or transportation of stolen property. The Second Circuit based its decision on the fact that these ongoing diversions constituted additional wrongful acts which caused new and independent injuries to the Marley Estate within the four year limitation period:

> [T]he instant case . . . involves a continuing series of fraudulent actions undertaken to divert and conceal assets and income. A variety of schemes were employed, involving frequent misappropriations of discrete amounts of money from different sources. . . . Defendants were found guilty of funnelling royalty checks out of the estate from the time of Marley's

> death to the commencement of this litigation, and each illegal diversion constituted a new and independent legally cognizable injury to the estate.

Bingham, 66 F.3d at 561 (Steinberg Pet. at 15a).

Second, after the jury had adjudged Petitioners liable for damages, the special verdict sheet required it to state during what time periods the damages it awarded had been suffered by the Marley Estate. The jury indicated that all of the damages it awarded were suffered in periods after December 31, 1982, i.e. within the four years immediately prior to when the action was commenced. (*See* Zolt Pet. at 9-10 n.2 (quoting verdict sheet).)

Petitioners are thus wrong to suggest that the injuries for which the jury awarded damages were not suffered within four years of suit.

As the Second Circuit recognized, the only natural interpretation of the verdict is that the jury awarded damages for independent injuries resulting from diversions of funds after December 31, 1982, i.e. for injuries caused by predicate acts committed within the four year limitation period.[2] This is further demonstrated by the fact that the jury awarded a relatively small percentage of the demonstrable damages suffered by the Marley Estate.[3] Although Petitioners now

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2. Contrary to Petitioner Zolt's contention (Zolt Pet. at 6), for which he cites no record support, there was never an agreement that a finding of knowledge on or before December 10, 1982 would bar the RICO claim in its entirety.

3. The Estate calculated that $13.4 million in funds had been diverted from the Marley Estate from 1981 to 1986, including $10.5 million in royalties generated and received after Bob Marley's death. Allowing for various credits, the Estate sought a total of $9.7 million in compensatory damages plus $1 million in consequential damages.

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apparently believe that the special verdict sheet was improperly drafted (*e.g.* Zolt Pet. at 9 n.2), they waived this objection by failing to raise it when they had the opportunity to do so before the jury began its deliberations.

REASONS FOR DENYING THE WRIT

SUMMARY OF ARGUMENTS

Most of the issues raised by Petitioners are based on allegations that they were treated unfairly or that the lower courts abused their discretion -- matters that do not remotely merit review. In addition, the factual record of Petitioners' sustained theft of assets and income over a five year period up to the time of suit neither lends itself to resolving any division of authority in the courts of appeals relating to RICO accrual nor raises any issue as to the constitutionality of RICO's pattern and enterprise requirements.

This case is not an appropriate vehicle for the Court to resolve the variations on the RICO accrual rule because the facts are unique and Petitioners' arguments depend upon a tortured reading of verdict sheets to which they failed to object. The only natural reading of the verdict sheet demonstrates that the claims would have been timely under any known accrual test. The particular facts of this case do not permit examination of the issues on which the lower courts have differed.

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Bingham, 66 F.3d at 558 (Steinberg Pet. at 8a). The jury awarded a total of only $1,050,000 in compensatory damages, plus $1,000,000 against Petitioner Steinberg in punitive damages. The punitive damages were later reduced to $250,000 in light of the treble damage award on the RICO claims. *Id.* (Steinberg Pet. at 9a).

The circuits have universally rejected constitutional challenges to RICO's pattern and enterprise requirements, and this Court has routinely declined to review this issue. The courts have had little trouble applying this Court's guidance concerning the application of these RICO elements. Petitioners do not and could not show that there was any unfairness in applying RICO to them, considering the flagrant and wide-ranging nature of their illegal conduct.

Petitioners' other purported grounds for certiorari are based on asserted procedural errors. None of these even purports to involve a division of authority, an unsettled area of the law, plain error, or any important policy matter worthy of the Court's attention.

ARGUMENT AND AUTHORITIES FOR DENYING THE WRIT

I. REVIEW OF THE RICO ACCRUAL ISSUE WOULD SERVE NO PURPOSE.

A. This Case Offers No Opportunity To Consider Any Issue On Which The Circuits Are Divided

In *Grimmett v. Brown*, Nos. 94-16137, 94-16214, 1996 WL 29094 (9th Cir. Jan. 26, 1996)[4], the Ninth Circuit recently provided a useful summary of the law relating to when a RICO cause of action accrues. *See id.* at *2-*5. The Court's summary shows that there is more common ground than divergence among the principles applied in the various circuits.

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4. For the Court's convenience, copies of the *Grimmett* case have been lodged with the Clerk.

Without exception, the circuits that have considered the question of when a cause of action accrues under RICO base accrual on the discovery principle. However, an apparent conflict has arisen in relation to the question of what the plaintiff must actually or constructively discover before the limitations period will start to run. About half the circuits employ an "injury-based" discovery rule, holding that a civil RICO cause of action accrues when the plaintiff discovered or should have discovered his injury.[5] The other circuits follow an "injury and pattern-based discovery rule," holding that a cause of action accrues when the plaintiff discovered, or should have discovered not only the injury, but also that the injury was caused by conduct forming part of a pattern of racketeering.[6] Significantly, no circuit holds a RICO cause of action to accrue upon discovery of either individual predicate acts or the pattern of racketeering, without injury.[7]

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5. *See Rodriguez v. Banco Central*, 917 F.2d 664, 665-66 (1st Cir. 1990); *Bingham*, 66 F.3d at 559 (Steinberg Pet. at 11a), *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1102 (2d Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989); *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211, 220 (4th Cir. 1987); *La Porte Constr. Co. v. Bayshore Nat'l Bank*, 805 F.2d 1254, 1256 (5th Cir. 1986); *McCool v. Strata Oil Co.*, 972 F.2d 1452, 1464-65 (7th Cir. 1992); *Grimmett v. Brown*, Nos. 94-16137, 94-16214, 1996 WL 29094 (9th Cir. Jan. 26, 1996).

6. *See Keystone Ins. Co. v. Houghton*, 863 F.2d 1125, 1130 (3d Cir. 1988); *Caproni v. Prudential Securities, Inc.*, 15 F.3d 614, 619-20 (6th Cir. 1994); *Granite Falls Bank v. Henrikson*, 924 F.2d 150, 154 (8th Cir. 1991); *Bath v. Bushkin, Gaims, Gaines & Jonas*, 913 F.2d 817, 820-21 (10th Cir. 1990); *Bivens Gardens Office Bldg. Inc. v. Barnett Bank of Fla., Inc.*, 906 F.2d 1546, 1553-55 (11th Cir. 1990), *cert. denied*, 500 U.S. 910 (1991).

7. Even the so-called split between jurisdictions following injury-based discovery rules and injury and pattern-based discovery rules is somewhat illusory. An examination of the leading cases in the

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Aside from the distinction between injury-based accrual and injury and pattern-based accrual, courts have crafted special rules or exceptions designed to prevent unfairness in particular circumstances. Recognizing that a pure discovery rule may sometimes lead to injustice where the predicate acts or injuries continue past the initial point of discovery, the courts (including the Second Circuit) generally apply a "separate accrual" rule. *See Grimmett*, 1996 WL 29094 at *3-*4. Under the principle of separate accrual, each time a plaintiff suffers a new and independent injury a new cause of action accrues, either when the plaintiff discovered or should have discovered the new injury (in injury-discovery circuits),[8] or when the plaintiff discovered or should have discovered that the independent injury was part of a pattern of racketeering (in injury and pattern-discovery circuits).[9]

As this overview makes clear, an area where this Court's guidance might arguably be useful relates to whether a RICO cause of action accrues upon discovery of the injury alone or

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Second Circuit, classified as an injury-based circuit, shows that the injury plus pattern rule has not been rejected so much as it simply has not been presented. *See, e.g., Rodriguez*, 917 F.2d at 667 (noting that the facts of *Bankers Trust* did not raise the issue of pattern discovery).

8 *See, e.g., Bankers Trust*, 859 F.2d at 1102; *Bingham*, 66 F.3d at 559 (Steinberg Pet. at 11a).

9. *See, e.g., Bivens*, 906 F.2d at 1553-55. As a variation of this separate accrual rule, the Third Circuit has adopted a rule which appears to be the most liberal. It allows a RICO action to be brought for all injuries so long as the last injury or last predicate act which is part of the same pattern of racketeering activity occurred within four years before the commencement of the action. *See Keystone*, 863 F.2d at 1130-31.

upon discovery that the injury was caused by a pattern of racketeering activity. However, the facts of the present case do not afford an opportunity for the Court to address this question, because the result will be the same under either test.

Petitioners apparently fail to recognize that the Second Circuit's injury-discovery rule, under which Respondent's RICO claims were held to be timely, is the more restrictive of the tests.[10] The addition of a pattern requirement can result in a date of accrual after an injury was discovered -- in which case it will be less likely for a claim to be time-barred -- but can never result in accrual before there has been an injury. Under either test a cause of action cannot accrue until the plaintiff suffers injury, the *sine qua non* of accrual. Inasmuch as all of the injuries for which the jury awarded damages to the Estate were suffered within the four-year limitations period, the addition of a pattern discovery requirement will not affect the result.

The distinction between injury-based accrual and injury and pattern-based accrual could only be properly explored by reviewing a case in which the plaintiff's injuries were or could have been discovered more than four years before suit but the pattern only became evident during the limitations period.[11] This case does not present such a scenario, and

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10. *See Agristor Fin. Corp. v. Van Sickle*, 967 F.2d 233, 241 (6th Cir. 1992) (noting that the injury and pattern discovery rule under *Bivens* is "more generous" than the injury discovery rule (referred to simply as the "discovery rule") followed by courts such as the Second Circuit (citing *Bankers Trust*).

11. This fact pattern has occurred in cases such as *Grimmett*,1996 WL 29094, and *Granite Falls*, 924 F.2d 150. In these cases the plaintiffs argued that it would be unjust to hold that their claims accrued before the RICO pattern could have been discovered. *Compare Grimmett*, 1996 WL 29094 (claim time-barred although pattern was

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would not afford an opportunity to consider, except perhaps in the abstract, what the significance of pattern-discovery should be in RICO accrual. The facts do not offer a concrete opportunity to consider the merits of the different rules, and the parties will not be in a position to air the adverse viewpoints.

This case would also not be an appropriate vehicle to resolve any circuit split because Petitioners' schemes are convoluted and unique. The courts below reached their holdings after reviewing closely the extensive factual detail regarding Petitioners' illegal schemes contained in the record. This review showed that, contrary to Petitioners' arguments, the jury did not find that the Estate had knowledge of all their wrongful acts before four years prior to suit, and that all injuries for which the jury awarded damages occurred after December 31, 1982.

Nor should the Court consider reviewing this issue prematurely, if at all. The principle that accrual should be based on discovery appears to be universally accepted and, notwithstanding differences of opinion between the circuits on some points, it is difficult to say that the results reached are inconsistent or unjust. This Court has already declined several opportunities to consider RICO accrual since the issue was left open in *Agency Holding Corp. v. Malley-Duff*

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> discovered during limitations period, because injury had been discovered earlier) *with Granite Falls*, 924 F.2d 150 (claim timely notwithstanding fact that injury and wrongful acts were discovered before limitations period, because pattern could only have been discovered within the four years before action commenced).

& Associates, Inc., 483 U.S. 143 (1987).[12] A case on more suitable facts will doubtless be presented for review in due course, if the Court is inclined to address the question.

Nor is there, as Petitioners incorrectly suggest, a conflict of authority on the principle of separate accrual for independent injuries applied by the Second Circuit. To be sure, the Third Circuit has rejected the Second Circuit's approach in favor of its more liberal "last injury" or "last predicate act" rule, under which "[i]f the complaint was filed within four years of the last injury or the last predicate act, the plaintiff may recover for injuries caused by other predicate acts which occurred outside an earlier limitations period but which were part of the same pattern." *Keystone Ins. Co. v. Houghton*, 863 F.2d 1125, 1130-31 (3d Cir. 1988). But none of the authorities cited by Petitioner Steinberg as having rejected the "separate accrual rule" (Steinberg Pet. at 12) actually rejected the principle of separate accrual for independent injuries. The cases cited by Petitioner Steinberg adopt the more liberal injury and pattern based discovery rule, using "separate accrual rule" as shorthand for the more strict injury-discovery rule they are declining to follow.[13]

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12. *See, e.g., Bontkowski v. First Nat'l Bank of Cicero*, 998 F.2d 459 (7th Cir.), *cert. denied*, 114 S. Ct. 602 (1993); *Bivens Gardens Office Bldg. Inc. v. Barnett Bank of Fla., Inc.*, 906 F.2d 1546 (11th Cir. 1990), *cert. denied*, 500 U.S. 910 (1991); *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096 (2d Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989).

13. *See, e.g., Bivens*, 906 F.2d at 1553 (11th Cir. 1990) ("We agree with the *Keystone* court that the 'separate accrual' rule applied by the *Bankers Trust* court fails to recognize that an injury to a plaintiff from a single predicate act does not evolve into a civil RICO injury until a 'pattern' of racketeering activity has developed."), *cert. denied*, 500 U.S. 910 (1991).

Indeed, it is clear that the rule enunciated by the Eleventh Circuit in *Bivens Gardens Office Building, Inc. v. Barnett Bank of Florida., Inc.*, 906 F.2d 1546 (11th Cir. 1990), *cert. denied*, 500 U.S. 910 (1991), the seminal injury and pattern discovery case, actually incorporates the principle of separate accrual for each independent injury. *See id.* at 1554-55 ("We hold, therefore, that with respect to each independent injury to the plaintiff, a civil RICO cause of action begins to accrue as soon as the plaintiff discovers, or reasonably should have discovered, both the existence and source of his injury and that the injury is part of a pattern.") (emphasis added). In *Bivens* the court held that although claims for some of plaintiffs' injuries were time-barred, claims for "independent subsequent injuries" were not. *See id.* at 1556-57.[14]

The other authorities Petitioners cite provide even less support for their position. Far from rejecting the principle of separate accrual, the courts in *Association of Commonwealth Claimants v. Moylan*, 71 F.3d 1398 (8th Cir. 1995) (Steinberg Pet. at 14 n.5), *Glessner v. Kenny*, 952 F.2d 702 (3d Cir. 1991) (Steinberg Pet. at 14 n.5; Zolt Pet. at 9), and *Ackerman v. National Property Analysts, Inc.*, 887 F. Supp.

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14. *See also Caproni*, 15 F.3d at 619-20 (adopting *Bivens* rule); *Granite Falls*, 924 F.2d at 154 (same); *Bath*, 913 F.2d at 820 (same); *Keystone*, 863 F.2d at 1130-31 (adopting "last predicate act" rule, under which predicate acts or injuries discovered after initial discovery of injuries and pattern revive the claim); *Podraza v. Carriero*, 212 A.D.2d 331, 630 N.Y.S.2d 163, 166-69 (4th Dep't 1995) (following *Bivens* line of cases; noting that *Bivens* rule incorporates principle of separate accrual); *cf. Klehr v. A.O. Smith Corp.*, 875 F. Supp. 1342, 1352 (D. Minn. 1995) (following *Granite Falls* and *Bivens*; "separate limitations periods may accrue from new injuries [but the] separate accrual is limited to distinct and independent injuries;" (citing *Bankers Trust*)).

494 (S.D.N.Y. 1992) (Zolt Pet. at 9), expressly acknowledged that separate causes of action could accrue for independent injuries suffered during the limitations period. *See Moylan*, 71 F.3d at 1403; *Glessner*, 952 F.2d at 707-08; *Ackerman*, 887 F. Supp. at 503-04. Indeed, the courts in *Glessner* and *Ackerman* expressly relied on the Second Circuit's decision in *Bankers Trust* for guidance. The courts in these cases simply held, as the Second Circuit did in *Long Island Lighting Co. v. IMO Industries, Inc.*, 6 F.3d 876 (2d Cir. 1993) ("*LILCO*"), that on the facts before them injuries allegedly suffered during the limitations period were not actually new or independent.

The Second Circuit's application of the separate accrual principle was not, as Petitioner Zolt asserts (Zolt Pet. at 9), confusing or contradictory. After a close review of the details of Petitioners' schemes, the Court determined that the injuries suffered by the Estate during the four years prior to commencement were caused by additional wrongful acts which took place during that period, and were therefore "new and independent" within the rule established by *Bankers Trust*. This determination distinguished the case here from that addressed by the Second Circuit in *LILCO*. *See Bingham*, 66 F.3d at 559-61 (Steinberg Pet. at 11a-15a).

Since there is no circuit split in relation to the principle of separate accrual, there is no need or reason for the Court to review the Second Circuit's fact-intensive determination on this point. Indeed, the highly factual nature of this issue itself militates against disturbing the decisions below.

B. The RICO Claim Was Not Time-Barred Under The Rules Advocated By Petitioners.

Petitioners argue that RICO accrual should be governed by the "discovery rule," claiming Respondent's RICO claim would be time-barred if this rule were applied. (Steinberg Pet. at 14; Zolt Pet. at 11.) Petitioners do not explain what

they mean by the "discovery rule," failing to acknowledge that all of the prevailing accrual rules, including the Second Circuit's, are already based on discovery.[15] The reason for this vagueness is not hard to fathom. Because the jury found that Respondent's RICO injuries were suffered within the four-year limitations period before the action was commenced, the RICO claims would only be time-barred if a RICO cause of action could accrue before a plaintiff has been injured. Not surprisingly, none of the prevailing tests would allow such a result. Injury is one of the essential elements of a RICO cause of action, *see* 18 U.S.C. §§ 1962(c) & 1964(c), (1984); *Sedima S.P.R.L. v. IMREX Co.*, 473 U.S. 479, 496 (1985), and it would be absurd to suggest that a cause of action can accrue with respect to an injury not yet suffered by a plaintiff.

Petitioner Steinberg's suggestion that Respondent's RICO claim would be time-barred under *La Porte Construction Co. v. Bayshore National Bank*, 805 F.2d 1254 (5th Cir. 1986) (Steinberg Pet. at 13-14), is puzzling. The rule applied in *La Porte* appears to be identical to the injury-based discovery rule followed by the Second Circuit here. Certainly nothing in *La Porte* suggests that a RICO cause of action should accrue when wrongful acts are discovered, regardless of when (or whether) they cause injury.[16]

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15. It is telling that Petitioner Steinberg relies on *La Porte*, 805 F.2d 1254, an injury discovery case, for his "discovery rule" (Steinberg Pet. at 14), while Petitioner Zolt relies on *Bivens*, 906 F.2d 1546, the seminal injury plus pattern case, for his "discovery rule." (Zolt Pet. at 11.)

16. In *La Porte* the alleged wrongful acts consisted of misappropriations of funds, *see* 805 F.2d at 1256, as to which the injury (loss of the funds) would have been discovered at the same time as the wrongful acts themselves. The Second Circuit cited *La Porte* as an injury-

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Petitioner Zolt's reliance on *Bivens*, 906 F.2d 1546 (Zolt Pet. at 11), is equally peculiar. *Bivens* is the seminal case for the injury and pattern based discovery rule. *See id.* at 1554 ("with respect to a plaintiff injured by one or more predicate acts, a civil RICO cause of action for damages will not accrue until the plaintiff knows, or should have known, of his injury and that the injury is part of a pattern of racketeering activity"). Judged by this test, Respondent's RICO claim was also unquestionably timely.

Petitioners' real disagreement is not with the law applied by the Second Circuit but the facts found by the jury. Their limitations argument is predicated on a fundamental misstatement of the record, i.e. that the jury found all Petitioners' wrongful acts and resulting injuries to have been committed and discovered outside the limitations period. The jury and the courts below rightly rejected this argument. Instead they found that Petitioners' periodic diversions of royalties and other funds owed to the Marley Estate constituted independent predicate acts of wire fraud, mail fraud and interstate transportation of stolen property which continued over the entire five year period prior to commencement of suit, and awarded damages only for those

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based discovery case. *See Bingham*, 66 F.3d at 559 (Steinberg Pet. 112). It may also be questionable whether *La Porte*, which was decided without the guidance provided by this Court in *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143 (1987), still represents the law of the Fifth Circuit. In *Crowe v. Smith*, 856 F. Supp. 1178 (W.D. La. 1994), the court did not follow *La Porte* but adopted the Third Circuit's last predicate act rule, under which Respondent's claims would undoubtedly be timely. *See id.* at 1181-85.

injuries occurring within four years of the commencement of the action.

II. RICO'S CONSTITUTIONALITY IS NOT IN DOUBT.

A. No Court Has Seriously Questioned RICO's Constitutionality.

The initial reservation expressed by Justice Scalia in his concurrence in *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989), is the only chink in an otherwise solid wall of authorities that have found RICO's pattern requirement to pass constitutional muster. The ten circuits, including the court below, that have considered the constitutionality of the pattern requirement have upheld it,[17] as have almost all district courts that have addressed the issue.[18] The one contrary case cited by Petitioner Steinberg

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17. *See United States v. Oreto*, 37 F.3d 739, 752 (1st Cir. 1994), *cert. denied*, 115 S. Ct. 1161 (1995); *Bingham v. Zolt*, 66 F.3d 553, 556 (2d Cir. 1995), *petitions for cert. filed*, 64 U.S.L.W. 3561 (U.S. Feb. 5, 1996) (No. 95-1245), 64 U.S.L.W. 3561 (U.S. Feb. 9, 1996) (No. 95-1276); *United States v. Woods*, 915 F.2d 854, 863 (3d Cir. 1990), *cert. denied*, 499 U.S. 947 (1991); *United States v. Bennett*, 984 F.2d 597, 606 (4th Cir.), *cert. denied*, 113 S. Ct. 2428 (1993); *United States v. Krout*, 66 F.3d 1420, 1432 (5th Cir. 1995), *cert. denied*, 64 U.S.L.W. 3559 (U.S. Feb. 20, 1996); *United States v. Tripp*, 782 F.2d 38, 42 (6th Cir.), *cert. denied*, 475 U.S. 1128 (1986); *United States v. Ashman*, 979 F.2d 469, 487 (7th Cir. 1992), *cert. denied*, 114 S. Ct. 62 (1993); *United States v. Dischner*, 974 F.2d 1502, 1509-10 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1290 (1993); *Cox v. Administrator U.S. Steel & Carnegie*, 17 F.3d 1386, 1398 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 900 (1995); *United States v. Swiderski*, 593 F.2d 1246, 1249 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 993 (1979).

18. *See NOW v. Scheidler*, 897 F. Supp. 1047, 1089 (N.D. Ill. 1995); *United States v. Wei*, 862 F. Supp. 1129, 1139 (S.D.N.Y. 1994);

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was reversed on appeal. *See Columbia Natural Resources, Inc. v. Tatum*, 58 F.3d 1101 (6th Cir. 1995) (reversing unreported district court decision which dismissed RICO claim on vagueness ground), *petition for cert. filed*, 64 U.S.L.W. 3427 (U.S. Dec. 4, 1995) (No. 95-880). Nor have challenges to the constitutionality of RICO's enterprise requirement met with success.[19] This Court has routinely

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Corporacion Insular de Seguros v. Reyes Munoz, 826 F. Supp. 599, 607 (D.P.R. 1993); *Bingham v. Zolt*, 823 F. Supp. 1126, 1132 (S.D.N.Y. 1993), *aff'd*, 66 F.3d 553 (2d Cir. 1995); *United States v. Crosby*, 789 F. Supp. 440, 442 (D.D.C. 1992), *aff'd*, 20 F.3d 480, *cert. denied*, 115 S. Ct. 221 (1994); *Schrag v. Dinges*, 788 F. Supp. 1543, 1553-54 (D. Kan. 1992); *United States v. Eisenberg*, 773 F. Supp. 662, 729-30 (D.N.J. 1991); *In re Crazy Eddie Sec. Litig.*, 747 F. Supp. 850, 863 (E.D.N.Y. 1990); *United States v. Busacca*, 739 F. Supp. 370, 378 (N.D. Ohio 1990), *aff'd*, 936 F.2d 232 (6th Cir.), *cert. denied*, 502 U.S. 985 (1991); *Beck v. Edward D. Jones & Co.*, 735 F. Supp. 903, 906-07 (C.D. Ill. 1990); *United States v. Thevis*, 474 F. Supp. 134, 139 (N.D. Ga. 1979), *aff'd*, 665 F.2d 616 (5th Cir.), *cert. denied*, 459 U.S. 825 (1982); *United States v. Stofsky*, 409 F. Supp. 609, 614 (S.D.N.Y. 1973).

19. *See Bingham v. Zolt*, 66 F.3d at 566; *United States v. Freeman*, 6 F.3d 586, 597 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1661 (1994); *United States v. Dischner*, 974 F.2d 1502, 1511 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1290 (1993); *United States v. Coonan*, 938 F.2d 1553, 1561-62 (2d Cir. 1991), *cert. denied*, 503 U.S. 941 (1992);*United States v. Wei*, 862 F. Supp. 1129, 1139 (S.D.N.Y. 1994); *United States v. Paccione*, 738 F. Supp. 691, 696-98 (S.D.N.Y. 1990); *United States v. Boffa*, 513 F. Supp. 444, 462-63 (D. Del. 1980); *United States v. Thevis*, 474 F. Supp. 134, 139 (N.D. Ga. 1979), *aff'd*, 665 F.2d 616 (5th Cir.), *cert. denied*, 459 U.S. 825 (1982).

declined to review cases challenging RICO on these grounds.[20]

There is no merit to Petitioner's suggestion that the lower courts have had trouble applying the pattern requirement. In *Sedima, S.P.R.L. v. IMREX Co.*, 473 U.S. 479 (1985), and *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989), this Court instructed the lower courts to consider whether there was continuity plus relationship among predicate acts in order to determine whether they formed a RICO pattern. Although this formula is not, as Justice Scalia pointed out in *H.J.*, mathematically precise, Petitioner does not put forward any evidence to show that the lower courts have had trouble following this Court's guidance.[21] Indeed, since *H.J.*, the district courts have had

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20. *See United States v. Oreto*, 37 F.3d 739 (1st Cir. 1994), *cert. denied*, 115 S. Ct. 1161 (1995); *United States v. Bennett*, 984 F.2d 597 (4th Cir.), *cert. denied*, 113 S. Ct. 2428 (1993); *United States v. Freeman*, 6 F.3d 586 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1661 (1994); *United States v. Dischner*, 974 F.2d 1502 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1290 (1993); *Abell v. Potomac Ins. Co. of Ill.*, 946 F.2d 1160 (5th Cir. 1991), *cert. denied*, 504 U.S. 911 (1992); *United States v. Coiro*, 922 F.2d 1008 (2d Cir.), *cert. denied*, 501 U.S. 1217 (1991); *United States v. Coonan*, 938 F.2d 1553 (2d Cir. 1991), *cert. denied*, 503 U.S. 941 (1992); *United States v. Glecier*, 923 F.2d 496 (7th Cir.), *cert. denied*, 502 U.S. 810 (1991); *United States v. Angiulo*, 897 F.2d 1169 (1st Cir.), *cert. denied*, 498 U.S. 845 (1990); *United States v. Pungitore*, 910 F.2d 1084 (3d Cir. 1990), *cert. denied*, 500 U.S. 915 (1991); *United States v. Woods*, 915 F.2d 854 (3d Cir. 1990), *cert. denied*, 499 U.S. 947 (1991); *United States v. Ruggiero*, 726 F.2d 913 (2d Cir.), *cert. denied*, 469 U.S. 831 (1984); *United States v. Morelli*, 643 F.2d 402 (6th Cir.), *cert. denied*, 453 U.S. 912 (1981); *United States v. Swiderski*, 593 F.2d 1246 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 933 (1979).

21. Petitioner cites the Third Circuit's divided opinion in *Tabas v. Tabas*, 47 F.3d 1280 (3d Cir.) (*en banc*), *cert. denied*, 115 S. Ct.

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little trouble distinguishing cases where a pattern is present from cases where one is not.[22] That the lower courts have

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2269 (1995), to show that there is intolerable confusion on the proper application of the pattern requirement. This Court apparently did not share Petitioner's view of *Tabas*, since it declined to review that case.

22. Recent district court cases finding a "pattern" include: *Fried v. Sungard Recovery Services, Inc.*, 900 F. Supp. 758, 764 (E.D. Pa. 1995); *Brooke v. Schlesinger*, 898 F. Supp. 1076, 1084 (S.D.N.Y. 1995); *Lui Ciro, Inc. v. Ciro, Inc.*, 895 F. Supp. 1365, 1383 (D. Haw. 1995); *D'Orange v. Feely*, 894 F. Supp. 159, 163 (S.D.N.Y. 1995); *Water Int'l Network U.S.A., Inc. v. East*, 892 F. Supp. 1477, 1482 (M.D. Fla. 1995); *Trustees of Plumbers & Pipefitters Nat'l Pension Fund v. Transworld Mechanical, Inc.*, 886 F. Supp. 1134 (S.D.N.Y. 1995); *Lavian v. Haghnazari*, 884 F. Supp. 670, 683 (E.D.N.Y. 1995); *Arenson v. Whitehall Convalescent & Nursing Home, Inc.*, 880 F. Supp. 1202, 1211 (N.D. Ill. 1995); *Rohland v. Syn-Fuel Associates--1982 Ltd. Partnership*, 879 F. Supp. 322, 334 (S.D.N.Y. 1995); *Lemelson v. Wang Labs., Inc.*, 874 F. Supp. 430, 434 (D. Mass. 1994); *Shuttlesworth v. Housing Opportunities Made Equal*, 873 F. Supp. 1069, 1077 (S.D. Ohio 1994); *Tribune Co. v. Purcigliotti*, 869 F. Supp. 1076, 1096 (S.D.N.Y. 1994), *aff'd* 66 F.3d 12 (2d Cir. 1995); and *Corporacion Insular de Seguros v. Reyes Munoz*, 849 F. Supp. 126, 134 (D.P.R. 1994).

Recent district court cases finding no "pattern" include: *Gruntal & Co., Inc. v. San Diego Bancorp*, 901 F. Supp. 607, 617 (S.D.N.Y. 1995); *Davis v. Hudgins*, 896 F. Supp. 561, 569 (E.D. Va. 1995); *Trustees of Plumbers & Pipefitters Nat'l Pension Fund v. De-Con Mechanical Contractors, Inc.*, 896 F. Supp. 342, 349 (S.D.N.Y. 1995); *Thai Airways Int'l Ltd.v. United Aviation Leasing B.V.*, 891 F. Supp. 113, 119 (S.D.N.Y. 1994), *aff'd*, 59 F.3d 20 (1995); *Wobble Light, Inc. v. McLain/Smigiel Partnership*, 890 F. Supp. 721, 724 (N.D. Ill. 1995); *Bonton v. Archer Chrysler Plymouth, Inc.*, 889 F. Supp. 995, 1004 (S.D. Tex. 1995); *Food Lion v. Capital Cities/ABC, Inc.*, 887 F. Supp. 811, 820 (M.D.N.C. 1995); *Rini v. Zwirn*, 886 F. Supp. 270, 294 (E.D.N.Y. 1995); *DeWit v. Firstar*

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been successfully determining whether a "pattern" exists belies Petitioner's suggestion that the requirement is vague.[23]

B. Petitioner Steinberg Makes No Showing That RICO Is Unconstitutional As Applied To Him.

Even if there were some basis for challenging the constitutionality of RICO, Petitioner Steinberg makes no attempt to show how the pattern or enterprise requirements were unconstitutional as applied to him in this action.[24] This omission is not surprising, considering the extent of Petitioners' wrongdoing and the obvious applicability of RICO.

As Petitioner Steinberg concedes, the fundamental purpose of the void for vagueness doctrine is to ensure that an offense is defined "with sufficient definiteness that

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Corp., 879 F. Supp. 947, 970 (N.D. Iowa 1995); *Pemberton Sales & Services, Inc. v. Banco Popular de Puerto Rico*, 877 F. Supp. 961, 970 (D.V.I. 1994); *Mathon v. Marine Midland Bank, N.A.*, 875 F. Supp. 986, 998 (E.D.N.Y. 1995); *Bowdoin Constr. Corp. v. Rhode Island Hosp. Trust Nat'l Bank*, 869 F. Supp. 1004 (D. Mass. 1994); *Trans World Airlines, Inc. v. Berger*, 864 F. Supp. 106, 109 (E.D. Mo. 1994); *Gotham Print, Inc. v. American Speedy Printing Ctrs., Inc.*, 863 F. Supp. 447, 458 (E.D. Mich. 1994); and *Harris Custom Builders Inc. v. Hoffmeyer*, 834 F. Supp. 256, 260 (N.D. Ill. 1993).

23. Indeed, it was the guidance provided in *H.J.* that caused the district court to reverse its initial ruling that the enterprise requirement was not properly alleged in this case.

24. In the absence of First Amendment considerations, vagueness challenges must be evaluated based on the particular application of the statute and not "on the ground that [the statute] may conceivably be applied unconstitutionally to others in situations not before the Court." *New York v. Ferber*, 458 U.S. 747, 767 (1982).

ordinary people can understand what conduct is prohibited." (Steinberg Pet. at 18 (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)). Having conspired to commit the forgery and dozens of acts of common law fraud, mail fraud, wire fraud and interstate transportation of stolen property over a period of five years, Petitioners cannot seriously claim to have been surprised to have been found guilty of racketeering. This is especially so in the case of Petitioner Steinberg, who raises this issue, and whose wrongdoing was sufficiently clear to him to cause him to invoke his Fifth Amendment rights before the jury. Recent observations of the Sixth Circuit are apt:

> If one can take the time to avoid committing mail or wire fraud, or extortion, or murder, or any of the other enumerated predicate offenses, all of which are federal or state criminal offenses in their own right, then one can sleep safe in the knowledge that he will not be found to have violated RICO.
>
> The issue, bluntly and simply framed, is whether a person of ordinary intelligence would know that committing dozens if not hundreds of acts of wire and mail fraud, over the course of almost a decade against the same victim, might constitute a pattern of racketeering activity. Since, by its terms it only takes a minimum of two acts, it is simply implausible for a party to claim that it was not aware that committing numerous predicate acts would expose it to potential RICO liability.

Columbia Natural Resources, 58 F.3d at 1108-09.

There can be no reasonable doubt that Petitioners' conduct showed the requisite degree of continuity and relatedness to meet the standard for a RICO pattern under *Sedima* and *H.J.* The trial evidence showed that Petitioners' schemes were closely intertwined, were pursued continuously

over a five year period, and were all directed to one single goal: diverting funds that rightly belonged to the Marley Estate. Nor has Petitioner Steinberg suggested any reason why this Court's broad definition of a RICO enterprise, *see United States v. Turkette*, 452 U.S. 576 (1981), was not met here. In short, Petitioner's unsupported arguments against the constitutionality of RICO are wholly unpersuasive.

III. PETITIONER ZOLT'S PROCEDURAL OBJECTIONS DO NOT MERIT REVIEW.

Petitioner Zolt raises a number of additional objections to the procedures employed by the district court at trial. The Second Circuit found these largely to be based on misrepresentations of the record or matters that were well within the district court's discretion.

As explained in the Second Circuit's opinion, *Bingham*, 66 F.3d at 562-63 (Steinberg Pet. at 19a-21a), there was no inconsistency in the jury's findings and is no basis for arguing that the district court abused its discretion in declining to ask further questions of the jury. Nor has Petitioner suggested any reason why this supposed error would be worthy of certiorari. Petitioner's real complaint may be with the form of the interrogatories presented to the jury. (Zolt Pet. at 6-7, 9 n.2, 12-13.) Since neither Petitioner Zolt nor any other defendant objected to the special verdict sheet at the charge conference, this issue was not preserved for appeal. *See* Fed. R. Civ. P. 49(a); *Metromedia Co. v. Fugazy*, 983 F.2d 350, 363 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 2445 (1993).

Petitioner Zolt cites no case supporting his assertion that the Seventh Amendment guarantees a right to jury trial on the amount of attorneys fees awarded a successful litigant

pursuant to a statute. The courts have routinely rejected this argument.[25] In the only case cited by Petitioner, *Curtis v. Loether*, 415 U.S. 189 (1974), the Court held that the Seventh Amendment right is only activated if a party is pursuing a statutory claim for money damages, the traditional remedy in an action at law. *Curtis* had nothing to do with attorneys fees, and the Court plainly rejected the broad proposition for which Petitioner cites it, i.e. that there is a right to a jury trial whenever any statutory entitlement is enforced. *See id.* at 192-94.[26]

Petitioner Zolt's further attacks on the fairness of the trial raise no discernible issue -- let alone one requiring this Court's attention. Petitioner asserted nearly identical contentions before the Second Circuit, which made a careful review of the record before holding that "[a]ll of Zolt's contentions are factually baseless and, further, go to the discretionary conduct of a trial by the district judge."

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25. *See, e.g., Cleverly v. Western Elec. Co. Inc.*, 450 F. Supp. 507 (W.D. Mo. 1978), *aff'd*, 594 F.2d 638 (8th Cir. 1979); *Swofford v. B&W Inc.*, 336 F.2d 406 (5th Cir. 1964), *cert. denied*, 379 U.S. 962 (1965); *Empire State Ins. Co. v. Chafetz*, 302 F.2d 828 (5th Cir. 1962); *Younis Brothers & Co. v. Cigna Worldwide Ins. Co.*, 882 F. Supp. 1468 (E.D. Pa. 1994); *Griffin v. United States Postal Service*, 635 F. Supp. 190 (N.D. Ga. 1986).

26. Petitioner Zolt also misstates the record when he asserts that the district court awarded fees "in summary fashion," based on an affidavit alone. (Zolt Pet. at 15.) The voluminous materials submitted to the court in support of the fee application included a detailed accounting, supported by affidavit, of over 500 pages taken directly from the computer printouts of the time records of Respondent's attorneys. Petitioner was given an ample opportunity to challenge the sum sought, which was ultimately reduced 15% by the district court. *Bingham*, 66 F.3d at 565-66 (Steinberg Pet. at 25a-27a).

Bingham, 66 F.3d at 566 (Steinberg Pet. at 27a-28a). Respondent respectfully refers the Court to the Second Circuit's discussion of the fairness of Petitioner Zolt's treatment by the trial court. *See id.* at 566 (Steinberg Pet. at 27a-28a).

CONCLUSION

For the foregoing reasons, the petitions for a writ of certiorari should be denied.

Dated: New York, New York
March 5, 1996

Respectfully submitted,

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